83 - 1386

No.

Office - Supreme Court, U.S.
FILED
FEB 21 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HON. RONALD A. LEGGETT,
Collector of Revenue of the City of St. Louis,
HON. PAUL M. BERRA,
Comptroller of the City of St. Louis,
and
the CITY OF ST. LOUIS,
Petitioners,

v.

CRATON LIDDELL, etc., et al.
Respondents.

On Petition for Writ Of Certiorari To The
United States Court of Appeals for the Eighth Circuit

APPENDIX
Volume II

ANTHONY J. SESTRIC
1015 Locust Street
Suite 1110
St. Louis, Missouri 63101
(314) 241-8600

JAMES J. WILSON,
City Counselor
*ROBERT H. DIERKER, JR.
FRANCIS M. OATES
Associate City Counselors
EDWARD J. HANLON
Assistant City Counselor
314 City Hall
St. Louis, Missouri 63103
(314) 622-3361
Attorneys for Petitioners

*Counsel of Record

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

		Page
I.	Interim Orders of Court of Appeals	A-351
J.	Orders of District Court Relating to Taxes and Budgets	A-363
K.	February 8, 1984 Opinion of Court of Appeals	A-406

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1957

Craton Liddell, et al,
Plaintiffs/Appellees,

v.

State of Missouri, et al,
Defendants/Appellants.

Appellant's Application for
Stay; Separate Stay Requested
by St. Louis County.

No. 83-2118

Craton Liddell, et al,
Plaintiffs/Appellees,

v.

City of St. Louis,
Plaintiff-Intervenor/Appellant.

Appeal by City of St. Louis;
Application for Stay by
St. Louis County.

No. 83-2140

In Re: City of St. Louis, Paul Berra and Ronald A. Leggett,
Petitioners.

Petition for Writ of Prohibition.

Submitted: September 2, 1983

Filed: September 13, 1983

Before LAY, Chief Judge, and HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG and BOWMAN, Circuit Judges. *EN BANC.*

ORDER

The State of Missouri and St. Louis County have filed applications for a stay pending appeal in opposition to a voluntary desegregation plan recently approved by the district court for the St. Louis area schools. The City of St. Louis has filed a petition for a writ of prohibition against the plan. Two objections are raised: (1) the plan imposes an interdistrict remedy based on intradistrict violations, and (2) the plan's provisions calling for the district court to exercise authority over school tax rates under certain contingencies conflicts with the principle of separation of powers. For the reasons discussed below, we deny the applications for the stay subject to the exceptions noted, and reserve a ruling on the petition for the writ of prohibition until we hear the appeals on the merits. We express no opinion on the merits of the serious questions raised on appeal at this stage of the proceedings.

BACKGROUND

On July 5, 1983, the United States District Court for the Eastern District of Missouri approved a settlement plan calling for the further desegregation of St. Louis schools. The plan had previously been approved by the Liddell plaintiffs, the Caldwell plaintiffs, the City Board of Education, and by all twenty-three suburban school districts in St. Louis County.

The plan provides for voluntary interdistrict transfers between city and suburban schools, and includes incentives to encourage these transfers. It calls for improvement in the quality of education in the city schools, and the establishment of additional magnet schools to attract suburban white students to the city schools. It requires additional special educational improvements in the all-black schools.

The plan further provides that the state will be responsible for the costs of the voluntary interdistrict transfers, the magnet schools, and various part-time and alternative integrative pro-

grams, plus one-half the cost of the programs to improve the quality of education in the city schools, and one-half the cost of the capital improvements required to carry out the plan. The state is to match equally any amount raised for capital expenditures through a voter-approved bond issue to be held prior to February 1, 1984.[1] The City Board is required to pay the remaining costs.

The plan also provides that the school tax rate reduction pursuant to state law (Proposition C) will be deferred to help fund the Board's share of implementation costs. If the city still does not have sufficient revenues to implement the plan, the plan provides that "the court will enter an appropriate order, following notice and an opportunity to be heard on the amount, to increase the property tax rate in the City of St. Louis by an amount necessary to fund the city board's share of the costs of the settlement plan."[2]

---

[1] The district court's financial adviser found that an existing debt service levy of $ .17, scheduled to be retired in February, 1984, could support a new $20 million bond issue amortized over twenty years without an increase in property taxes.

[2] The voluntary plan emerged after months of intensive negotiations, directed by court-appointed experts, and participated in by the Liddell, Caldwell, and City Board plaintiffs, and by all twenty-three St. Louis County school districts. An agreement was finally reached after the district court disclosed, in an August 6, 1982, order, the plan it would implement in the event the parties were unable to agree to a voluntary plan and the suburban school districts were found liable for constitutional violations. The district court's proposed plan essentially called for one unified metropolitan school district divided into four subregions with a uniform tax rate, and a metropolitan-wide student transfer transportation system.

The district court had originally set February 14, 1983, as the date for trial on interdistrict liability, but postponed this trial from time to time to allow the parties the opportunity to resolve their differences.

The plan is currently being implemented. School opened in several suburban districts prior to Labor Day and opened in the remaining suburban districts on September 6 and in the city schools on September 7.

DISCUSSION:

The Motion for a Stay

We noted the applicable standards for granting a stay pending appeal in *Reserve Mining Co. v. United States,* 498 F.2d 1073, 1076-1077 (8th Cir. 1974). After a careful review of the record, the applications for a stay, the opposition briefs, and oral argument, we are convinced that the applications should be denied with the exceptions noted below.

The controlling factor in our judgment is the public interest. When the public interest is weighed in conjunction with the harm to the appellants and the appellees, we feel it would be improvident to grant the stay.

First, the timing of the applications suggests we not exercise our discretion in favor of issuing a stay. The settlement plan was approved by the district court on July 5, 1983. Motions for a stay were filed in district court by the state and St. Louis County on July 26 and August 8, respectively. The time has simply been inadequate to permit the thorough consideration this matter requires. We will hear the matter en banc on the merits in November. By that time, the parties will have fully briefed the matter and we will have had the opportunity to consider thoroughly the record and the briefs.

Second, the school districts have already begun to implement the voluntary plan. Issuance of a stay would necessitate reassigning students and teachers, discontinuing student transportation to county schools, and revising administrative decisions concerning budgeting, orientation, and hiring. The lives of thousands of students and teachers would be disrupted before this Court had decided the matter on the merits.

The exceptions to our denial of the stay order are as follows:

(1) Paragraph 5(e) of the district court's July 5, 1983, order provides:

> (e) the State of Missouri shall pay in full the costs of transportation of the interdistrict transfer students; the reasonable, actual costs to implement incidental programs, such as the student recruitment efforts, any community involvement centers, the Voluntary Interdistrict Coordinating Council (VICC) and its staff, the Recruitment and Counselling Center and its staff and offices, and parent involvement programs; and reasonable attorney's fees that may be awarded to the prevailing plaintiffs City Board, Caldwell, and Liddell.

The provisions of paragraph 5(e) may be implemented as ordered, with the exception that the city and suburban school districts shall not further recruit or accept interdistrict transfer pupils other than those who have indicated an intention to transfer prior to the date of issuance of this order.

(2) Paragraphs 6(b) and (c) of the district court's July 5, 1983, order provide:

> (b) the City Board shall submit to its voters, on or before February 1, 1984, a proposed bond issue of an amount determined by the City Board as sufficient to meet those of its capital improvement needs as are deemed necessary to meet its constitutional obligation to desegregate the City's public schools;
>
> (c) should that bond issue fail to obtain the two-thirds majority vote required by State law, the Court will consider an appropriate order to obtain the funds deemed sufficient to meet the capital improvement needs of City Board in complying with its constitutional obligation to desegregate the City's public schools[.]

The vote on the bond issue referred to in paragraph 6(b) may proceed as scheduled. If the issue receives the required voter approval, the bonds may be issued. If it fails to receive voter approval, the district court shall defer further consideration of or action on any alternative measures to meet the capital needs of the City Board with respect to desegregation until further order of this Court.

(3) Paragraphs 6(a), (d), (e) and (f) provide as follows:

> (a) the City Board shall certify to the Court, on or before July 15, 1983, the amount needed to meet its share of the reasonable actual costs of implementing programs pursuant to the Settlement Plan, as approved, as well as the tax rate necessary to fund these costs;
>
> * * * *
>
> (d) the City Board is hereby authorized and directed not to reduce its operating levy in the City of St. Louis as of July 1, 1983, as otherwise required by Mo. Rev. Stat. § 164.013 (Proposition C). The State shall not withhold from the City Board funds that the State would otherwise withhold pursuant to Proposition C. The amount of revenue retained by the City Board by reason of not reducing its operating levy shall be utilized to fund the implementation of programs needed to meet City Board's consitutional obligation to desegregate the City's public schools pursuant to the Settlement Plan, as approved. Any revenue retained but not necessary to fund City Board's constitutional obligation shall be applied to reduce its operating levy on July 1, 1984;
>
> (e) in the event the above funding orders fail to provide the necessary funds, the Court will consider an appropriate order, following notice and an opportunity to be heard on the amount, to increase the City Board's property tax rate by an amount reasonably necessary to fund the City

Board's share of the costs of implementing the Settlement Plan programs pursuant to City Board's consitutional obligation to desegregate the City's public schools; and

(f) in its discretion, City Board may use other sources available to it to fund its share of the programs implemented pursuant to the Settlement Plan, as approved. To conform this order with the prior decree of the Eighth Circuit, *Liddell, supra,* 677 F.2d at 631, any outside funds received by City Board for the purpose of implementing these programs may first be applied to reduce the City Board's share of the costs of the programs and then applied to reduce the State's share of the costs of the programs.

The Board has thereto made the certification required by paragraph 6(a). The provisions of paragraph 6(d) may be implemented as ordered. The provisions of paragraph 6(e) may be implemented as ordered, but the district court shall not issue any order increasing the City Board's tax rate until further order of this Court. The provisions of paragraph 6(f) may be implemented as ordered.

The Petition for Writ of Prohibition

We defer action on the writ of prohibition until such time as we consider the appeals that have been filed on the merits.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1957

Craton Liddell, et al,
Appellees,

v.

State of Missouri, et al,
Appellants.

On State Appellants'
Application for Limited
Stay.

Filed: September 30, 1983

Before LAY, Chief Judge, and HEANEY, BRIGHT, ROSS, McMILLIAN,ARNOLD, JOHN R. GIBSON, FAGG and BOWMAN, Circuit Judges, En Banc.

ORDER

The motion of state appellants to stay appellees from instituting any of the provisions of Section IV, Quality Education, including the Appendix and Exhibit 2 as approved by the district court in paragraphs 1 and 2 of its order [H(2503)83] is denied.

The motion of the same parties to stay the implementation of paragraph 6(b) of the district court's order [H(2503)83], requir-

ing the City Board to submit to its voters a bond issue for capital improvements, is denied.

The motion of the same parties to stay further transfer of students is granted insofar as the transfer of students residing in the City District to the County District are concerned. Other pending applications involving the transfer of County students to the City schools and County students to other County schools may be made.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 83-1957, 83-2118 & 83-2140

Craton Liddell, et al,
Appellees,

v.

State of Missouri, et al
Appellants.

On Motion to Modify Order of
September 13.

Filed: September 30, 1983

Before LAY, Chief Judge, and HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG and BOWMAN, Circuit Judges, En Banc.

ORDER

The motion of the Honorable Paul M. Berra, Comptroller of the City of St. Louis, and the Honorable Ronald A. Leggett, Collector of Revenue of the City of St. Louis, to modify this Court's order of September 13, 1983, to expressly authorize the petitioners to place funds collected by reason of paragraph 6(3) of the district court's order of July 5, 1983, in a separate escrow account pending disposition of a petition for writ of prohibition, No. 83-2140, is denied.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100C(3)

Craton Liddell, et al.,
Plaintiffs,

v.

The Board of Education
of the City of St. Louis,
State of Missouri, et al.,
Defendants.

ORDER

(Filed Jan. 10, 1984)

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that City Board's motion, H(2821)83, dated December 15, 1983, be and the same is granted to the extent it seeks to add the Collector of Revenue of the City of St. Louis as a party to this proceeding. In all other respects, City Board's motion, H(2821)83, remains under consideration. Accordingly,

IT IS HEREBY FURTHER ORDERED that the Honorable Ronald A. Leggett, Collector of Revenue of the City of St. Louis, be and he is added as a party to these proccedings.

Dated this 10th day of January, 1984.

William W. Hungate
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100C(3)

Craton Liddell, et al.,
Plaintiffs,

v.

The Board of Education
of the City of St. Louis,
State of Missouri, et al.,
Defendants.

MEMORANDUM

(Filed Jan. 10, 1984)

This matter is before the Court on City Board's motion to join party and for order to enforce and protect prior orders, H(2821)83, dated December 15, 1983. Only the City of St. Louis and Collector of Revenue responded to this motion, H(2835)83, dated December 27, 1983.

By its motion, City Board asks the Court specifically (a) to add the City of St. Louis Collector of Revenue (Collector), Honorable Ronald A. Leggett, as a party[1] to these proceedings; and (b) to order the City of St. Louis (City) and Collector to pay

---

[1] While the motion does not state explicitly whether City Board seeks to add the Collector as a defendant or as a plaintiff, City Board's supporting memorandum notes "[t]his Court . . . has the inherent authority under Rules 19(a) and 21, Fed. R. Civ. Proc. to add Leggett as a party defendant." Memorandum at 5-6, H(2821)83, dated December 15, 1983 (footnote omitted). Furthermore, the City's and Collector's joint response in opposition to the motion begins by stating "City Board has moved, H(2821)83, to join the Collector of Revenue of the City of St. Louis, Hon. Ronald A. Leggett, as a party defendant[.]" H(2825)83 at 1, dated December 27, 1983.

to City Board certain school tax receipts, as well as interest and penalty. City Board argues that, pursuant to statutory and city charter provisions governing the duties of the Collector, the Collector has no discretion regarding payment of school tax monies collected by him and must pay such revenues to City Board in a timely fashion. Here, however, City Board contends the Collector has not paid an amount of revenues approximately equal to the total amount collected pursuant to paragraph 6(d) of this Court's order of July 5, 1983. The revenues City Board alleges are unlawfully withheld by the Collector are "necessary to implement the orders of this Court." Finally, City Board alleges that the "action by the City of St. Louis and Leggett wrongfully interferes with and prevents City Board from funding its obligations pursuant to this Court's directives and the law of the case."

In opposition to this motion, the City and Collector assert that, despite disagreement with the Court's orders, city officials have certified the tax rate and prepared tax bills, and the Collector has distributed and received payments on those tax bills. Arguing that the Collector is "not under the City's control," they note that he established an escrow account for the disputed revenues in consideration of city taxpayers who might otherwise protest the entire amount of taxes paid, and that the escrow is a "reasonable response" to the situation. Finally, in light of their position that no obstruction of Court orders has occurred, the City and Collector argue that action by this Court would be "superfluous."

Background

On July 5, 1983, this Court entered an order which stated, *inter alia:*

> For the payment of City Board's share of the costs [of implementation of the approved Settlement Plan] . . .

> (d) the City Board is hereby authorized and directed not to reduce its operating levy in the City of St. Louis as of July 1, 1983, as otherwise required by Mo. Rev. Stat. § 164.013 (Proposition C). The State shall not withhold from the City Board funds that the State would otherwise withhold pursuant to Proposition C. The amount of revenue retained by the City Board by reason of not reducing its operating levy shall be utilized to fund the implementation of programs needed to meet City Board's constitutional obligation to desegregate the City's public schools pursuant to the Settlement Plan, as approved. Any revenue retained but not necessary to fund City Board's constitutional obligation shall be applied to reduce its operating levy on July 1, 1984.

Order at 4-5, H(2503)83, dated July 5, 1983.

On August 15, 1983, in addition to filing a notice of appeal, the City of St. Louis applied for a stay of the July 5, 1983, order insofar as

> it enjoins any reduction in City Board's tax rate and assumes continuing jurisdiction over City Board's tax rate, pending apeal or other application for relief before the United States Court of Appeals for the Eighth Circuit. In the alternative, the City respectfully seeks clarification of its responsibilities to collect taxes pursuant to H(2503)83, including direction concerning what rate to collect.

H(2591)83, dated August 15, 1983. In denying the City's request for a stay, this Court stated: "[a]s to the City's alternative request, it is not this Court's practice to render advisory opinions." Order H(2609)83 at 2, dated August 18, 1983.

On or about August 22, 1983, the City, the Collector, and the Comptroller of the City of St. Louis (Comptroller), Honorable Paul Berra, filed a petition for writ of prohibition asking the Eighth Circuit Court of Appeals "to prohibit [the district court]

from enforcing or taking further action with regard to [the] order enjoining the property tax rollback required by Mo. Rev. Stat. § 164.013 (Proposition C)[.]" The appellate court received responses and heard argument on the writ petition and two other requests for stays of the July 5, 1983, order. On September 13, 1983, the court of appeals explicitly held: "[t]he provisions of paragraph 6(d) may be implemented as ordered." *Liddell v. State of Missouri,* Nos. 83-1957, 83-2118, 83-2140, order at 7 (8th Cir. Sept. 13, 1983)(en banc). The court of appeals also deferred action on the petition for writ of prohibition "until such time as we consider the appeals that have been filed on the merits." *Id.*

On September 21, 1983, the Collector and the Comptroller, and not the City, asked the Eighth Circuit to modify its September 13, 1983, order so as "to expressly authorize petitioners to place funds collected by reason of paragraph 6(d) of the district court's order of July 5, 1983, in a separate escrow account pending disposition of a petition for writ of prohibition, No. 83-2140." The Eighth Circuit subsequently denied this motion. *Liddell v. State of Missouri,* Nos. 83-1957, 83-2118, 83-2140, order (8th Cir. Sept. 30, 1983)(en banc).

Discussion

Rule 19(a)(1) of the Federal Rules of Civil Procedure requires joinder of a person who is subject to service of process and whose joinder will not deprive the court of subject matter jurisdiction, if "in [the person's] absence complete relief cannot be accorded among those already parties[.]"

The advisory committee notes to Rule 19(a) specifically state that persons should be joined if, in their absence, "the court would be obliged to grant partial or 'hollow' rather than complete relief to the parties before the Court." 1966 Advisory Committee Note to Rule 19, 39 F.R.D. 89, 90 (1966). *Accord* 7 Wright, Miller & Kane, Federal Practice & Procedure: Civil §1604 at 4 (Supp. 1982).

Under the present circumstances of this case, as more fully described above, and assuming, *arguendo,* for the purposes of this motion, that City Board's allegations are true, the relief ordered by this Court and affirmed by the Eighth Circuit will not be fully effectuated unless the Collector is joined as a party to this action. The Collector, moreover, has invited himself into these proceedings to the extent he seeks extraordinary relief from the Eighth Circuit.

While there is authority for the imposition of remedies on those who are nonparties and who have actual notice of the court's orders, *see Harvest v. Board of Public Instruction,* 312 F.Supp. 269, 276-82 (M.D. Fla. 1970)(ordered relief imposed against nonparty state officials for noncompliance with remedial order in school desegregation case); *United States v. Hall,* 472 F.2d 261 (5th Cir. 1972)(federal court had power to impose sanctions on nonparty for willful violation of order in school desegregation case), this Court determines it more reasonable and equitable to join the Collector to insure all interested parties complete relief throughout these proceedings.

The Court will grant City Board's motion to the extent City Board seeks to add the Collector as a party to these proceedings, but will retain under consideration the other requests of the motion.

Dated this 10th day of January, 1984.

William W. Hungate
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100C(3)

Craton Liddell, et al.,
Plaintiffs,

v.

The Board of Education
of the City of St. Louis,
State of Missouri, et al.,
Defendants.

SHOW CAUSE ORDER

(Filed Jan. 10, 1984)

This matter is before the Court on City Board's motion to join party and for order to enforce and protect prior orders, H(2821)83, dated December 15, 1983. Only the City of St. Louis and its Collector of Revenue responded to this motion, H(2835)83, dated December 27, 1983.

In particular, City Board asks this Court to order the City of St. Louis (City) and its Collector of Revenue (Collector) to pay to City Board certain school tax receipts, as well as interest and penalty thereon.

Having added the Collector of Revenue as a party to these proceedings, and having carefully considered this matter,

IT IS HEREBY ORDERED that on or before February 2, 1984, the Collector and the City shall each show cause why they should not be ordered immediately to pay over to City Board the amounts in dispute, together with interest and penalty thereon.

IT IS HEREBY FURTHER ORDERED that, on or before February 2, 1984, the Collector shall show cause (a) why he should not be held in contempt for failure to follow orders of this Court, specifically H(2503)83 at 5-6, paragraph 6(d), dated July 5, 1983, as affirmed by the United States Court of Appeals for the Eighth Circuit, *Liddell v. State of Missouri,* Nos. 83-1957, 83-2118, 83-2140, order at 7 (8th Cir. Sept. 13, 1983)(en banc); *see also Liddell v. State of Missouri,* Nos. 83-1957, 83-2118, 83-2140 order (8th Cir. Sept. 30, 1983)(en banc); and (b) why he should not be held personally liable for any interest or other penalty or costs incurred by the City on account of his activities relating to the disputed funds.

To comply with this show cause order, the City and its Collector may file their affidavits, briefs, and other documentation supporting their own positions.

IT IS HEREBY FURTHER ORDERED that the United States Marshal be and he is directed to serve personally the Honorable Ronald A. Leggett, Collector of Revenue of the City of St. Louis, with a copy of this show cause order.

Dated this 10th day of January, 1984.

William W. Hungate
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100C(3)

Craton Liddell, et al.,
Plaintiffs,

v.

The Board of Education of the
City of St. Louis, State of Missouri, et al.,
Defendants.

(Filed September 22, 1983)

ORDER

This matter is before the Court on the Report and Recommendation of United States Magistrate, H(2608)83, dated August 18, 1983, and parties' objections thereto, H(2629)83 (Hazelwood School District), and H(2634)83 (State defendants), dated August 29, 1983.

This funding and budget order is issued in accordance with the mandate of the United States Court of Appeals for the Eighth Circuit, dated September 13, 1983. Thus, by this order, the Court does not intend to approve or require the participating districts' further recruitment or acceptance of interdistrict transfer pupils other than those who have indicated an intention to transfer prior to September 13, 1983. *Liddell v. State of Missouri,* Nos. 83-1957, 83-2118, 83-2140, slip op. at 5 (8th Cir. Sept. 13, 1983)(order). Nor does this Court express or intimate any opinion on the possibility or merits of any "alternative measures to meet the needs of the City Board with respect to desegregation" or of any "order increasing City Board's tax rate." *Id.,* slip op. at 6, 7.

The Court recognizes this Settlement Plan is a new and innovative program. It is difficult to know with precision what the actual costs will be or what economies can be accomplished consonant with the objectives of the settlement. Therefore, the Court reserves the right to review and revise future budget items after there is actual experience upon which to base these financial decisions. The Court acknowledges that certain budgetary decisions must be made now or the Plan may founder before it has fairly begun.

Noting that a page of experience is worth a volume of logic, the Court will direct the financial adviser to review, analyze, and report on the budgeting, funding, and financing of the Plan's implementation. These reports will provide recommendations, if any, for alterations in the funding, financing, and payment provisions of the approved Plan. The first report should be filed on or before December 31, 1983, and quarterly thereafter until further order of Court.

State defendants object to the Magistrate's recommendation that the State separately pay costs incurred by Hazelwood in transporting students seeking to transfer to another school within the district. Hazelwood would not have provided the intradistrict transfer option and would not have incurred any such transportation costs if it had not participated in this approved Plan. Therefore, the Court is not persuaded by the State's contention that there is no "program" for which the State must pay. Even the language of the Plan and the Order approving it allows allocation to the State of these costs. Although Section VIII of the approved Plan limits the State's responsibility for providing transportation to interdistrict transfers, the Plan's language requiring the City Board and State to share the costs of transporting transferring students, and the Order's language at ¶¶ 5(c) and 5(e), which allocate to the State costs of incidental programs and of programs outside the boundaries of the City of St. Louis, permit such an allocation. Thus, the Magistrate's recommendation will be followed. To the extent possible, state

transportation aid shall be applied to defray these transportation costs. Furthermore, the Court encourages the parties' efforts to reduce the costs of transportation where such reductions do not compromise the safety and quality of that transportation.

Hazelwood objects to the Magistrate's failure to recommend the approval of the district's request for the State's separate payment of $60,000 in estimated legal fees and of $15,539 in administrative costs. With regard to the legal fees, Hazelwood asserts these "expenses would not be required except to aid implementation of the Plan." H(2629)83 at 2. Hazelwood later states that the "fees will increase in direct proportion to the careful oversight and vigorous defense produced by the State in challenging the Plan," which implies the fees expended will depend on subsequent litigation of the Plan rather than solely on implementation of the Plan. *Id.* Hazelwood has not established support for its contention that, even in the absence of contractual or statutory provisions, shifting of the payment of one litigant's legal fees to another litigant is required or authorized by the terms of the Plan. Without more, the district court will not overturn the Magistrate's recommendation that this request for legal fees not be approved.

Hazelwood also objected to the Magistrate's failure to approve $15,539 in administrative costs. Hazelwood acknowledges that its participation in the Plan will not require the hiring of additional personnel but asserts that Plan participation will increase the responsibility of the "district's reduced work force." Hazelwood has not established that such added responsibility, if any, may not be compensated from the home or host district incentive payments. Thus, the Magistrate's recommendation will be sustained.

The State disputes the Magistrate's recommendation that the magnet review committee need not approve magnets listed for expansion or creation in 1983-1984. Although this Court's order

does not explicitly require such approval, it does direct Plan participants "to analyze and review the need" of each such magnet. Without reducing the importance of that review, this Court ascertains that there is no present mandate that the listed magnets for 1983-1984 and 1984-1985 be approved by a magnet review committee.

This Court finds that a relatively small county student population in a magnet school does not justify a prohibition against expansion of that school. Thus, the Court will follow the Magistrate's recommendation approving costs of the foreign language secondary program at Roosevelt, as well as other magnets.

The State argues that it should not have to pay administrative costs in addition to student transfer incentive payments, in the absence of a school district's showing that those costs cannot be defrayed by the amount received in incentive payments. The Court will approve the State's separate payment of certain administrative costs incurred by participating districts, in accordance with the Magistrate's report and recommendation. Although the Court does intend that St. Louis County school districts be compensated for expenses, in accordance with the terms of the approved Plan, the Court does not intend to provide a financial windfall to districts participating in the Plan. The amount, need for, and use of the transfer payments will be more easily ascertained after implementation of the Plan.

After review of any recommendations reported by the financial adviser, the Court may determine that, absent a school district's showing to the contrary, all administrative costs should be defrayed by the incentive payments. At this point, the Court will adopt the Magistrate's recommendation for approval of the State's separate payment of certain nonmagnet costs of Affton, Hancock Place, Hazelwood, and Mehlville school districts.

In addition to prior arguments against approval of magnet costs, the State asserts that it should not pay any costs for magnet schools within the City beyond their start-up costs, except in accordance with the terms of an agreement entered into between the State and Webster Groves. As to capital costs, the State asserts it should not have to pay these where no sites have been chosen and where costs go beyond building modification costs. The Court is not bound by any agreement between other parties and does not find the Magistrate's recommendation unreasonable. Thus, the City Board's request for $5,308,043.40 for magnets will be approved in accordance with the Magistrate's recommendation.

The State objects to City Board's request that the State pay the costs of transporting City students to City magnet schools. The Court finds reasonable the Magistrate's determination that these are part of the costs of implementing magnets which are to be paid in full by the State pursuant to ¶ 5(a) of the July 5, 1983, order. To the extent possible, state transportation aid shall be applied to defray these transportation costs.

The State contends the Magistrate erred in determining that the list of programs on pages 26 and 27 of the Memorandum dated July 5, 1983, was illustrative rather than exhaustive. As the Magistrate found, the Court suggested priorities in that program listing. After suggesting priorities, the Memorandum acknowledges that "the Court is not expressing either endorsement or disapproval of all the programs mentioned in the Appendix or Exhibit 2, nor is the Court intending to limit or preclude consideration of additional quality education programs." Memorandum, H(2503)83 at 28. Thus, while not endorsing implementation efforts that "may topple the program" through "overload and waste," the Court will follow the Magistrate's recommendations regarding programs not explicitly listed on pages 26 and 27 of the Memorandum.

State defendants object to the Magistrate's recommendation that certain costs requested by City Board for the controller's and the treasurer's offices be approved for separate payment by the State. The State argues these are part of City Board's "everyday operating costs" which should not be transferred to the Settlement Plan for funding. The Magistrate reasonably found that "[a] program's prior existence or funding status should not determine whether or not a presently requested amount should be approved if the present request is not duplicative, is related to the presently approved program, and is for a reasonable amount." Without more than the State's broad assertion against these costs, the Court will approve the amounts as recommended by the Magistrate.

The Court is also not persuaded by the State's objections to the Magistrate's recommendations that the Court approve the requests regarding the alternative high school, the upgrading of services to handicapped students, the curriculum supervision program, the library resource center personnel, and the nursing staff.

At page 16 of his Report and Recommendation, the Magistrate states: "[t]o the extent these are costs incurred in implementing part-time programs in the non-integrated schools and only to that extent, the undersigned finds they should be paid in full by the State pursuant to paragraph 5(b) of the Court's July 5, 1983, order." If there is an understanding that this Court intended the State to pay one hundred percent of the costs of the proposed part-time non-integrative program, the Court takes this opportunity to clarify that misunderstanding.

In 1980, the United States Court of Appeals for the Eighth Circuit stated that, in a public school system "deliberately constructed and maintained to enforce racial segregation," the board of education's establishment of a neighborhood attendance policy did not fulfill its affirmative duty to take steps necessary to attain a unitary system. *Adams v. United States,*

620 F.2d 1277, 1285-86 (8th Cir.)(en banc)(quoting *Swann v. Charlotte-Mecklenberg Bd. of Ed.*, 402 U.S. 1, 28 (1971)), *cert. denied,* 449 U.S. 826 (1980). Thus, City Board's 1954-1956 neighborhood attendance policy and "continuation transfer" policy perpetuated and failed to eliminate the segregated City school system. *Adams, supra,* 620 F.2d at 1286-87, 1288. The Eighth Circuit further found that, after 1956, "[City] Board's steadfast adherence to a student assignment policy which did not desegregate the schools and its use of intact busing, school site selection, block busing, permissive transfers, and faculty assignments have preserved segregation in the school system." *Adams, supra,* 620 F.2d at 1288. In an effort to remedy segregated conditions, City Board proposed the association of racially isolated schools for special projects and activities to "provide opportunity [sic] for significant interracial contacts and experiences...[and] some racial mixing for the remaining all-black and all-white schools." *Id.* at 1292. Although that City Board plan was not adopted, the Eighth Circuit recognized the continued existence of one-race schools and the need to develop and implement "less than full-time integrated learning experiences." *Id.* at 1296; *see also Liddell v. Board of Education,* 667 F.2d 643, 648 (8th Cir.), *cert. denied,* 454 U.S. 1081, 1091 (1981) ("Although the plan reflects the fact that it is not possible to fully integrate every school in the St. Louis system, the district court faithfully followed the directions of this Court by providing a variety of integrative experiences and enhanced educational opportunities for students remaining in the predominantly black schools.") Subsequently, the Eighth Circuit reiterated that the district court could "require that additional part-time programs be established at state expense to provide for more *integrative experiences* for students in all-black city schools, including programs which would involve voluntary participation by suburban schools." *Liddell v. Board of Education,* 677 F.2d 626, 642 (8th Cir.), *cert. denied,* 102 S.Ct. 172 (1982)(emphasis added). For improving the quality of education in the remaining all-black schools in the City of St. Louis as part

of desegregation efforts, the Eighth Circuit has stated that the district court could require the State *and* City Board, as defendants, to take "additional steps" to make such improvements. *Id.* at 641-42.

Based on the record and the circumstances of this case, it is both unfair and unreasonable to require the State to pay one hundred percent of the costs of part-time programs that do not provide more integrative experiences for students in all-black City schools. Part-time programs that are not desegregative in nature are not the main thrust of this case. *See, e.g., Liddell v. Caldwell,* 546 F.2d 768, 773 n.10 (8th Cir. 1976), *cert. denied,* 433 U.S. 914 (1977). Where a part-time program is provided in a one-race school with students of the same race only participating in the program, then the State should not be required to pay more than one-half the cost of such a program. *Cf. Liddell, supra,* 677 F.2d at 641-42. To the extent that a part-time program within a one-race school does not actually enhance desegregation, then both the State and City Board shall pay equal shares of the actual reasonable costs incurred in implementing such programs as part of remedial desegregation efforts. This Court will approve the amounts requested for such programs but will not approve the State's full funding of those programs unless they are actually desegregative in nature.

Having carefully reviewed the Magistrate's Report and Recommendation, the State's and Hazelwood's objections thereto, as well as the pertinent record, and subject to the provisions of the September 13, 1983, order of the United States Court of Appeals for the Eighth Circuit,

IT IS HEREBY ORDERED that, to the extent the Report and Recommendation approved the State's full payment of the costs of nondesegregative part-time programs at the non-integrated schools, the Report and Recommendation is not approved or sustained. Accordingly,

IT IS HEREBY FURTHER ORDERED that the State and City Board shall each pay one-half of the costs of any non-desegregative part-time programs provided only to students of one-race schools within the City of St. Louis.

IT IS HEREBY FURTHER ORDERED that in all other respects, the Report and Recommendation of the United States Magistrate, H(2608)83, be and the same is sustained, adopted, and approved. Accordingly,

IT IS HEREBY FURTHER ORDERED that the State shall make separate payments for Kirkwood's magnet school, Clayton's magnet school, University City's magnet schools, Normandy's magnet schools, and the City Board's Foreign Language Secondary magnet school [City Board Ex. 5 at 56].

IT IS HEREBY FURTHER ORDERED that the State shall make separate payment to the Hancock Place School District for a total of $29,220.00, as requested.

IT IS HEREBY FURTHER ORDERED that the State shall make separate payment to Affton School District for a total of $35,441.09, as requested.

IT IS HEREBY FURTHER ORDERED that the State shall make separate payment to Mehlville School District for a total amount of $47,122.00 for a desegregation coordinator and for workshop expenses, and shall not make a separate payment for the other costs Mehlville sought.

IT IS HEREBY FURTHER ORDERED that the State shall make separate payments to Hazelwood School District in the amount of $103,771.00, as listed in page 12 of the Magistrate's report, and shall not make separate payments for the other costs Hazelwood sought. The State's obligation to pay shall be reduced to the extent Hazelwood either does not incur the expenses for transportation or receives other reimbursement for transportation expenses.

IT IS HEREBY FURTHER ORDERED that the amount remaining in dispute in the line item "inflation contingency" throughout the City Board's budget be and the same is not approved.

IT IS HEREBY FURTHER ORDERED that the State shall separately pay its share of functions 6903 and 1907 of component A902 under ¶ 5(c) of the July 5, 1983, order, and shall not separately pay any amounts in the remaining functions of component A905 except to the extent those amounts may be paid by the State pursuant to the terms of ¶ 5(d) of the July 5, 1983, order.

IT IS HEREBY FURTHER ORDERED that City Board shall amend its request for approval of costs to "restore and increase librarians" [City Board Ex. 6 at 4-5] so as to seek funding for one full-time librarian for every three elementary schools, and aides supplying the remaining staffing needs in these schools, and as amended the request be and the same is approved. Furthermore, City Board's request for funding for one media specialist for each secondary school and for .5 librarian be and the same is approved. The State shall separately pay its share of these costs.

IT IS HEREBY FURTHER ORDERED that the City Board's request for postage for the public affairs program be and the same is approved in the amount of $16,000.00 only, and the State shall separately pay its share of this approved amount.

IT IS HEREBY FURTHER ORDERED that, on or before October 3, 1983, the State and the City Board shall submit a joint written report reflecting all areas of agreement and areas of disagreement, including the reasons therefor, for each amount noted in the City Board's exhibits 2 and 9, regarding the object code "not otherwise classified;" and any amounts remaining in dispute for this object code be and the same are not approved for this year.

IT IS HEREBY FURTHER ORDERED that, with the deletion of the amounts required by the above paragraphs, and except for nondesegregative part-time programs at non-integrated schools, all amounts requested by the City Board for full payment by the State be and the same are approved.

IT IS HEREBY FURTHER ORDERED that the amounts sought for nondesegregative part-time programs at non-integrated schools be and the same are approved with funding shared equally by City Board and State.

IT IS HEREBY FURTHER ORDERED that the City Board's remaining requests for programs to be funded by the City Board and the State equally be and the same are approved upon deletion of the amounts remaining in dispute; and the State shall separately pay its share of these costs.

IT IS HEREBY FURTHER ORDERED that, on or before October 3, 1983, each participating district that submitted a budget to which the State defendants originally objected shall file another 1983-1984 budget reflecting the amounts approved through court order or through agreement with the State.

IT IS HEREBY FURTHER ORDERED that all budget requests to which the relevant parties have agreed be and the same are approved, and that the State shall pay its share of these approved budgets. All Plan participants having budgets to which State defendants agreed shall file a copy of the 1983-1984 budget with the Court on or before October 3, 1983.

IT IS HEREBY FURTHER ORDERED that the State shall make its payments to the relevant Plan participants and the City Board shall make its payments in installments according to the provisions of Order H(1810)82, dated December 17, 1982. Since the date of the first installment payment, September 20, has passed, the State and City Board shall make their first installment payment on or before October 3, 1983.

IT IS HEREBY FURTHER ORDERED that the objections of the Liddell plaintiffs be and the same are overruled.

IT IS HEREBY FURTHER ORDERED that, on a quarterly basis, the Court-appointed financial adviser shall review, analyze, and report on the budgeting, funding, and financing of the Plan's implementation. Each report shall provide recommendations, if any, for alterations in the funding, financing, and payment provisions of the approved Plan. Plan participants shall provide access to the information needed by the expert to comply with this Order. Parties may file responses, if any, to each report within ten days after the report is filed. The first report shall be filed on or before December 31, 1983.

Dated this 22nd day of September, 1983.

William L. Hungate
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100-C(3)

Craton Liddell, et al.,
Plaintiffs,

v.

The Board of Education
Of The City Of St. Louis,
State Of Missouri, et al.,
Defendants.

(Filed Aug. 18, 1983)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This matter is before the undersigned United States Magistrate upon the budget disagreements among the Liddell plaintiffs, the State defendants, and various St. Louis area school districts participating in the approved Settlement Plan, for the 1983-1984 school year. 28 U.S.C. §636(b)(1)(B). A hearing was held on August 5, 1983.

1. Liddell Objections.

The Liddell plaintiffs object to the failure of the City Board to implement for 1983-1984 Program Component B101, "Lower Pupil-Teacher Ratios in Non-Integrated Schools." They argue that the Court should reject the City Board's suggestion that for 1983-1984 classroom space limitations do not permit the reduction of pupil-teacher ratios in non-integrated schools below the reduction proposed for district-wide implementation. At the hearing Dr. Jerome Jones, Superinten-

dent of the St. Louis schools, testified that 1983-1984 has been intended as the period of planning for reducing the ratio in 1984-1985 and that some provisions of the voluntary plan will improve the non-integrated schools in 1983-1984. This position is reasonable for 1983-1984 and the undersigned will recommend that the objections of the Liddell plaintiffs be overruled.

2. State Objections.

In accordance with the budgeting procedure contained in the Court's order approving the Settlement Plan, representatives of the participating school districts and of the State met to discuss the proposed budgets, and submitted statements regarding any outstanding objections. At the hearing, several of the parties informed the Court that some of the disagreements were then or would soon be settled. *See also* Report of State defendants, H(2573)83, dated August 10, 1983. In addition to outstanding budget disagreements between the City Board and the State, the State has objections to budget requests for magnet proposals in four St. Louis County school districts and to the amounts requested in budgets submitted by four other St. Louis County school districts. Furthermore, an agreement between the State and the Webster Groves school district regarding its proposed budget was submitted to the Court on August 16, 1983.

a. Magnet Schools.

The State objects to various expenditures for magnet schools because these schools have not yet received the approval of the Voluntary Interdistrict Coordinating Council or the magnet review committee. The Court's memorandum directed "plan participants to analyze and review the need of each expanded and new magnet proposed for 1983-1984 and 1984-1985 prior to the program's implementation." Memorandum H(2503)83 at 22. This language does not constitute a requirement that any committee approve the establishment or expansion of each magnet. Thus, the undersigned is not persuaded that the State

defendants' instant argument justifies disapproval of such budgets in their entirety. The following magnet school budgets, to which the State defendants raised only this objection may be approved in accordance with the agreement reached between the interested parties:

Foreign Language Magnet City Board Ex. 5 at 56	$311,035.68
Kirkwood (no other magnet budget presented to the Court)	3,715.00
Clayton (approved by the Court in April, 1983)	29,026.00
Normandy	51,510.65
University City	45,540.00

b. County Non-magnet Programs.

The State defendants object to budgets submitted by four other St. Louis County school districts, because they contain requests for personnel and equipment costs incurred in providing general programs to transfer students. The State defendants assert that no such costs should be approved for payment separate from the student transfer incentive payments received by participating districts. The State reasons that the incentive payments, which are based on each district's per pupil costs, provide "more than enough reimbursement for operational costs, instructional costs and personnel costs for counselors, remiedial teachers or 'coordinators'." H(2532)83 at 4, dated July 25, 1983. Based upon this reasoning, the State defendants object to Hancock Place School District's request for $29,220; Affton School District's request for $35,441.09; and Mehlville School District's request for $112,942.00; and part of Hazelwood School District's request for $247,935.

c. Hancock Place.

Hancock Place seeks approval of a budget totalling $29,220.00 for the costs of salary, benefits and travel for a "Desegregation Coordinator." H(2532)83, attachment for Hancock Place School District budget proposals. The costs of supplies and secretarial help for this newly created staff position would be provided by the district. Roger Brodbeck, Superintendent of Hancock Place, testified that the district had participated in the 12(a) voluntary plan during 1982-1983 and that during that year, the existing administrators shared, with hardship, the duties of the proposed coordinator. Based upon that participation and the more than double the 1982-1983 number of transfer students expected by Hancock Place in 1983-1984, the district perceives a "definite, critical need" for this position. For example, Mr. Brodbeck stated that any transportation problems are an additional strain on the district's administration because the district does not provide transportation to its own resident students. The district's present administrative personnel are comprised of two principals for three elementary schools; a principal and an assistant principal at the high school; and a business manager (assistant superintendent) and a superintendent. Each administrator has one secretary.

Under these circumstances, the undersigned finds that Hancock Place's request for a reasonable amount to cover some of the expenses for a desegregation coordinator, or a total of $29,220, is reasonable and should be approved. After this year, the need and budgets for such an administrator may be reexamined in light of Hancock Place's experience with implementation of the plan.

d. Affton.

Affton seeks approval of a total of $35,441.09 in excess of any transfer incentives paid to the district.[1] This amount includes a full-time coordinator's salary and fringe benefits (27,519.15), a half-time secretary's salary and fringe benefits ($7,384.24), mileage for the coordinator (75.00), printing ($164.00), and equipment ($298.70).

Mr. Anthony Liebig, Director of Business for Affton School District, stated that the coordinator position, which was created solely for desegregation purposes during Affton's participation in the prior 12(a) voluntary plan, is needed because this district, of approximately 2,000 students, expects over twice as many transfer students in 1983-1984 as it had in 1982-1983, and has only two administrators who cannot absorb the added responsiblities.

Under the circumstances, the undersigned finds that this is a reasonable amount for necessary costs incurred solely because of Affton's participation in the approved Settlement Plan. Thus, the undersigned recommends that the Court approve the request in the amount of $35,441.09. Again, after this year, the need and budget for this position may be reexamined in light of Affton's experience in implementing the approved plan.

---

[1] The budget total of $227,986.17 originally proposed by Affton included a total of $188,917.56 for expected transfers. That amount is not being sought for State payment over and above the State's incentive payments, and thus is not before the Court for approval. Of the remaining $39,068.61 in the original budget, Affton agreed that $3,627.52 (for superintendent costs, business manager costs, and office space) could be recovered indirectly through the per pupil costs since the positions and office space already exist within the district. Thus, the total presently in dispute is $35,441.09.

e. Mehlville.

Mehlville School District seeks the Court's approval of a budget totalling $112,942.00, excluding the amount Mehlville will receive in student transfer payments. Of this amount, $39,622 is budgeted for a desegregation coordinator. In support of this request, Dr. Thomas Blades, Superintendent of Mehlville, testified that the district, which did not participate in the prior 12(a) plan, has a present enrollment of approximately 9,400 students and expects to receive up to 300 transfer students in 1983-1984. In Dr. Blades' professional opinion, the full-time desegregation coordinator position, which does not presently exist within the district, is necessary. Existing personnel have already taken on additional responsibilities since the district has recently reduced the number of its regular staff positions.

Mehlville also seeks approval of $7,500.00 for workshops for administrators, board members, and staff members.

This is Mehlville's first year of participation in the voluntary interdistrict transfer plan, with a relatively large number of incoming students expected. To assist the district's staff and the community in dealing with this participation, the Court should approve these two requests.

Mehlville's remaining requests consist of a secretary ($12,338), guidance counselor ($35,077), subclerical position ($1,070), various ancillary costs ($6,880), capital expenses ($7,293), and an "indirect cost rate" ($3,162). The undersigned believes that the district may obtain reimbursement for some, if not all, of these expenses through the still unbudgeted incentive payments. Thus, the Court should not approve these costs for separate payment by the State at this time.

f. Hazelwood.

Hazelwood proposes a 1983-1984 budget totalling $247,935 in expenditures and $257,945 in receipts.[2] Hazelwood's Ex. 1, Attachment 3 at 1 and 2. The sum of $68,125 for interdistrict transfer students should be compensated by the interdistrict student transfer payments that are separately made by the State according to a formula that is based upon the host district's per pupil costs. *Compare* Hazelwood's Ex. 1, Attachment 3 at 2, "(1) Proposed expenditures for 25 interdistrict transfers at $2,725 ea. (Est. Per Pupil Cost)" *with id.* at 1 and 3, §1, regarding allocation per pupil. Thus, the undersigned recommends that this sum not be paid by the State other than as the interdistrict student transfer incentive payments Hazelwood will otherwise receive according to the terms of the plan. As a result of this exclusion, the budget requests are reduced to $179,810 for payment of intradistrict student transfer transportation costs (total: $47,115); student activity transportation costs (total: $33,482); other costs (total: $39,213); and legal fees ($60,000).

Despite State's objection that such costs might be reimbursed through the transfer payments, the undersigned recommends the approval of the requested $21,288 for consultants' services and other expenses incurred in conducting the proposed inservice workshops. *See* Hazelwood's Ex. 1, Attachment 3 at 4, ¶5(a) - (c) and (f). This is Hazelwood's first year of participation in any voluntary transfer program and the requested costs are reasonable.

---

[2] The budget originally proposed by Hazelwood totalled $280,922 in expenditures, and $290,232 in receipts. Hazelwood's Ex. 1, Attachment 3 at 1 and 2. Dr. Thomas J. Lawson, Superintendent of Hazelwood School District, testified that, upon review of the budget, an error of duplication was discovered in the request regarding "part-time education programs." To correct the error, the proposed budget was reduced by $32,987, the amount of the duplication.

The undersigned is not persuaded, however, that the requested total of $15,539 in administrative costs should be paid by the State. First, Hazelwood has not shown, as did Affton and Hancock Place, that its present administrative, personnel, or economic circumstances require any additional positions or administrative expenses in the district's regular programs. Second, Hazelwood has not budgeted as an expenditure the estimated amount it will receive in home district incentive payments, or a possible total of $10,010. Hazelwood's Ex. 1, Attachment 3 at 3, ¶2. Hazelwood might use such payments to offset any such expenses. Thus, the undersigned does not recommend approval of this requested amount.

In addition, the State defendants object to Hazelwood's request for a total of $47,115 for costs incurred if forty-four eligible students seek intradistrict transfer to another school within Hazelwood. Hazelwood has one school falling within the intradistrict transfer terms of the agreement.

The Court's language does not prohibit the State's payment of Hazelwood's intradistrict transportation costs. The settlement agreement provided that the City Board and the State would share certain costs of implementing the approved plan. Section 10 at X-2. By the agreement's explicit terms, these shared costs include "transportation of transferring pupils," without limitation as to whether or not those transportation costs were incurred for *inter*district or *intra*district transfer students.

In approving the Settlement Plan, the Court explicitly allocated several, but not all, costs incurred in the implementation of the Plan. Order H(2503)83 at 2-4. Paragraph 5(c) specifically ordered the State to pay "one hundred percent of the reasonable actual costs of programs implemented outside the geographic boundaries of the City of St. Louis." *Id.* The State was also ordered to "pay in full . . . the reasonable, actual costs to implement incidental programs." *Id.* at ¶5(e). Clearly,

Hazelwood's intradistrict program is outside the geographic boundaries of the City of St. Louis. Thus, the question arises whether such intradistrict transportation costs are either costs of implemented programs or "costs to implement incidental programs." The undersigned finds that, because Hazelwood would not have incurred these expenses but for its participation in the approved Settlement Plan, these expenses should be paid by the State as costs of implementation of Settlement Plan programs.

For the same reasons, Hazelwood's requests for a total of $33,482 to cover the costs of "student activity transportation costs" and for a total of $1,886 to transpor. Hazelwood students participating in part-time educational programs, should be allowed. The State should not make any duplicate payments for the transportation of interdistrict transfer students to or within Hazelwood. Therefore, the recommended approval of the amount for interdistrict transfer students, or a total of $29,750, which is included in Hazelwood's request for student activity transportation costs, is not intended to authorize such duplication. If Hazelwood does not incur those costs because the State provides such transportation or if the State makes its interdistrict student transfer payments in a manner other than through payments on these approved budgets, then no further payment for those transportation costs is required of the State.

Hazelwood asks for approval of a total of $60,000 for "legal fees." Mr. Gene E. Aker, Assistant Superintendent for Hazelwood School District, testified that, in preparing this request, he estimated the fees at a rate of $80 per hour for fifteen hours each week. In further support of this request, Hazelwood's budget explanation states:

> According to the settlement agreement reasonable legal fees are to be borne by the state as a result of legal services rendered to a district in the implementation and monitoring process.

Hazelwood's Ex. 1, Attachment 3 at 6. Only in extraordinary circumstances will a court, absent an explicit statutory or contractual provision, shift to another litigant the attorney's fees incurred by one litigant. No such extraordinary circumstances have been shown to exist here. State defendants accurately point out that only Caldwell, City Board, and Liddell are specifically entitled to consideration of an attorney's fees award. Plan at XI-1, ¶B; order H(2503)83 at 9, ¶14. This requested amount should not be approved as "other costs incurred" in implementing this Plan.

Therefore, the undersigned recommends that the Court approve a total of $103,771 beyond the amount Hazelwood will receive from the State as student transfer incentive payments, as follows:

$47,115	Intradistrict transfer student transportation
33,482	Student activity transportation costs
1,886	Part-time educational parograms
19,018	For consultant expenses and inservice workshops
2,270	Fringe benefits on inservice salaries

Hazelwood's Ex. 1, Attachment 3 at 2, ¶5(3), (4) (5)(a) - (d), 5(f).

To the extent personnel and administrative costs are approved for separate payment by the State, rather than for reimbursement through the transfer payments, the recipient districts should not include those costs in determining the district's "cost per pupil."

g. City Board.

The City Board has proposed a budget totalling $16,235,461.80 for programs to be funded fully by the State (City Board Ex. 5), and a budget totalling $40,221,931.32 for programs to be funded by the State and City Board equally (City Board Ex. 6). Of the amount requested for full funding by the

State, $10,670,857.12 remains in dispute. Of the amount requested for funding equally shared by the State and City Board, $28,654,953.76 remains in dispute.

In addition to the previously approved costs for the Foreign Language magnet school at Roosevelt High School, City Board seeks the following amounts as "costs of implementing the magnet programs and schools" pursuant to paragraph 5(a) of the Court's order:

Building Preparation (City Board Ex. 5 at 77-83)	$4,100,760.00
Architecture & Engineering	10,943.64
Textbooks at Lyon & Woerner	71,106.12
Maintenance of Grounds, Buildings, and Equipment	309,833.64
Transportation of City residents to City Magnets	815,400.00
	$5,308,043.40

State defendants argue that these costs fall within the terms of ¶5(d) of the Court's order, which provides in part:

> City Board shall retain the obligation and responsibility to fund capital expenditures needed to restore, repair, maintain, or enhance existing facilities as part of City board's desegregation efforts.

Based upon this provision, State defendants contend these costs should remain the obligation of City Board.

These costs, whether or not they are capital expenditures, constitute costs of implementing magnet schools. Paragraph 5(a) of the order of July 5, 1983, specifies without limitation that the State is to pay the full costs of implementing magnets. Paragraph 5(d) is of more general application than ¶5(a) and is subject to the provisions of ¶5(a). Based upon this interpretation, the undersigned recommends that these costs be approved for payment by the State.

There are two general types of part-time programs within th Settlement Plan: (1) programs to which all signatories agree an which are contained in Section V of the Settlement Plan; and (2 programs to which all signatories have not specifically agree and which are directed to improving the quality of education i the nonintegrated schools in North St. Louis, *see* Section B o the Plan Appendix.

The type (1) classification includes the "Honors Music" pro gram, for which the City Board requested a total of $629,783.6 (City Board Ex. 5 at 2-10), and the "City/County Caree Education" program, for which City Board requested a total o $203,560.56. The State objects to both of these request because they are not listed at pages 26-27 of the Court' memorandum approving the plan, and because no committe has yet indicated approval of the programs. Neither of thes arguments is apposite. The list on pages 26-27 specifies pro grams on which the parties are to focus attention. The list doe not limit the programs that may be implemented but suggest priorities if plan participants are unable to implement all recom mended programs. Furthermore, the District Court's directiv to participants to review and analyze programs pertained ex clusively to magnet schools proposed for establishment or ex pansion in 1983-1984 or 1984-1985. Neither of these program is a magnet program; thus, the Court's directive is inapplicabl as a bar to their implementation.

With regard to the second category of part-time programs the State defendants object to the City Board's requests for (a the L.I.F.T. program, totalling $221,159.16 (City Board Ex. 5 at 20); and (b) Schools of Emphasis Program, totallin $297,466.56 (City Board Ex. 5 at 22). State defendants conten these costs should not be approved because these programs ar not listed on pages 26-27 of the Court's memorandum. Again the undersigned finds that the District Court's listing is not ex haustive or exclusive, and will recommend approval of the re quested costs.

City Board also asks for approval of the State's payment of costs incurred in coordinating the part-time programs in the non-integrated schools, for a total of $3,043,745.64 (City Board Ex. 5 at 15-17). State defendants argue they should not have to fully fund these costs, and that the costs should be shared equally by City Board, since "it is a general program for the entire school system." To the extent these are costs incurred in implementing part-time programs in the non-integrated schools and only to that extent, the undersigned finds they should be paid in full by the State pursuant to paragraph 5(b) of the Court's July 5, 1983, order. Thus, based upon the City Board's explanation of this request (City Board Ex. 1 at 6), the undersigned recommends approval of these expenses.

Again, the State defendants object to certain costs because the programs are not listed on pages 26-27 of the District Court's July 25, 1983, memorandum. These objections are directed to the City Board's budget requests for: Curriculum Development [City Board Ex. 6 at 1]; Middle School Math and Science Teachers [City Board Ex. 6 at 25]; Upgrade Quality of Services for Handicapped Students [City Board Ex. 6 at 26-27]; Alternative High School [City Board Ex. 6 at 31]; Tri-A Outreach Program for Dropouts and Expelled Students [City Board Ex. 6 at 32]; Middle School Science Enrichment [City Board Ex. 6 at 36]; Security Guard Service [City Board Ex. 6 at 39-40]; Controller's Office, Accounting and Auditing Services [City Board Ex. 6 at 43]; Insurance Administration [City Board Ex. 6 at 44]; Purchasing, et al. [City Board Ex. 6 at 45-49]; Planning Office [City Board Ex. 6 at 53]; and Personnel . . . for Deferred Maintenance...and Improvements [City Board Ex. 6 at 55-61].

As previously stated, the undersigned interprets the District Court's listing as a directive to focus attention on certain programs, and not as an exhaustive or limiting list of the only programs approved for implementation this year. Thus, the undersigned recommends the approval of costs for those programs to which the failure of a specific listing is the only objection: Cur-

riculum Development; Middle School Math and Science Teachers; Tri-A Outreach Program for Dropouts and Expelled Students; Middle School Science Enrichment; Security Guard Service; Purchasing, et al.; and Planning Office.

The State defendants also object to the requests for costs of the controller's office, accounting and auditing services; the treasurer's office, insurance administration; and the alternative high school, because these items were fully funded by the City Board through the 1981-1982 school year. A program's prior existence or funding status should not determine whether or not a presently requested amount should be approved, if the present request is not duplicative, is related to the presently approved program, and is for a reasonable amount. The undersigned finds that these programs are listed in Fairness Hearing Exhibit 2 (pages 9, 24 and 25). Furthermore, there is no allegation that the requested amounts are unreasonable, duplicative, or are for programs unrelated to this desegregation remedial effort. Since this is the only remaining objection to the first two budget requests, those requests should be approved.

The State defendants further object to the alternative high school budget request, because no site location is identified and because the District Court recently referred to alternative student discipline programs in an order pertaining to the intradistrict plan. First, the "alternative high school" is not listed as one of the "alternative student discipline programs" within the intradistrict desegregation plan or in the Court's recent order. Second, no evidence was presented at the hearing to indicate that the City Board considers it as such a program. In fact, Dr. Jones testified that this particular proposal is for those students who have "learning difficulties" and not for those who are "disciplinary problems." *See also* City Board's Post Hearing Memorandum, H(2587)83 at 13, dated August 12, 1983. The failure to have already chosen a site for this school is not a sufficient justification for disapproving this budget request. After the Fairness Hearing and upon the Court's ap-

proval of the Settlement Plan, the City Board determined that this program could be implemented by second semester of this year. Clearly, further planning, including the determination of the school's location, must occur prior to the program's implementation. The District Court should approve the amount requested for this program.

The State defendants further object to the City Board's request for $8,710,992.72 for "Personnel and Related Operational Resources Including Equipment for Deferred Maintenance and Improvements," [City Board Ex. 6 at 55-61]. The State defendants contend the City Board alone should bear these costs as "capital expenditures necessary to restore, repair, maintain, or enhance existing facilities" within the terms of ¶5(d) of the Court's July 5, 1983, order. The City Board included these as shared costs on the grounds that these are the "operational costs of maintenance" and not capital expenditures covered by the terms of ¶5(d) of the Court's order. The financial adviser reported that all of these components should be capitalized because they "are part of a total program presented in the Settlement Agreement to improve the quality of educational opportunities in St. Louis by rehabilitating and modernizing school buildings." Report on Inflation Contingency and Capital Outlay, H(2574)83 at 11, dated August 10, 1983 [hereinafter financial adviser's report]. The financial adviser defined a capital expenditure as "[a]ny expenditure which increases the value of the school district's property."

The undersigned notes an inadvertant inconsistency in the financial advisor's application of the definition of "capital expenditures" to certain functions of Component A902 in the City Board budget. The advisor at page 11 of his report recommended the capitalization of all of Component A902, while recommending that a function therein not be capitalized in Component C102, *i.e.* function 6903. The undersigned believes that functions 6903 and 1907 of Component A902 are not capital expenditures, because the record indicates they are for

maintaining the status quo of the assets concerned, and are not for increasing the assets' values. Therefore, the District Court should not approve any of the functions of Component A902, except functions 6903 and 1907, thereby approving a total of $304,129.08 for Component A902. This recommendation should not subsequently be construed as recommending the elimination of any subsequent payment obligations of the State pursuant to the terms of paragraph 5(d).

The State defendants object to the City Board's request for funds to upgrade the quality of services to handicapped students. In addition to their argument that this program is not among those listed on pages 26 and 27 of the District Court's July 5, 1983, memorandum, the State defendants contend that these additional costs can be partially reimbursed by State and Federal money for programs for the handicapped, and that the implementation of these programs is required by law and should not be contingent upon the receipt of additional funding. The City Board has demonstrated that these are costs incurred in improving existing services, rather than costs incurred in providing nonexistent services. Thus, this budget request should be approved. By recommending approval of this budget request, the undersigned does not intend to preclude the application of other funds to this program, or to approve duplicated revenues.

The State defendants object that the City Board's request for the "curriculum supervision" program is excessive, unnecessary and "not related to staffing patterns within the county." The State defendants also object to City Board's request to fund a "library resource center" as part of a program to upgrade the library/media service. The State defendants contend the latter request is "in excess of AAA standards." The City Board supports both requests on the basis that they are among those listed on pages 26 and 27 of the District Court's July 5, 1983, memorandum.

The fact that these programs may exceed county standards or state classification standards does not justify barring such pro-

grams as part of a remedial desegregation effort in the city's public school system. These programs are among those specified by the District Court for prompt consideration. By approving these budget requests, the undersigned is in no way intending to approve "excessive" or "unnecessary" expenses, and, as with all expenses, the City Board should make every effort to implement these programs without waste or duplication.

Because the undersigned has recommended the approval of costs for the Library Resource Center and for the alternative high school, the City Board's additional request for costs of the "operational services" for these programs should be approved. The State defendants only object to this particular request for the same reasons asserted against the Library Resource Center and the alternative high school. The State's objections to those programs were recommended to be overruled and do not require further consideration at this point.

The City Board also seeks approval of funds to increase the number of librarians and to provide nurses. The State defendants do not object to the programs but do object to the amount of staff the City Board seeks to hire as part of each program.

Concerning the librarians, the City Board asserts that it presently has no librarian in any elementary school and about one librarian for each secondary school. The City Board seeks approval of a budget that would permit one librarian for every 250 enrolled students. The State defendants propose one librarian for every four elementary schools, with aides to complete staffing needs. The City Board counters the State's suggestion by contending that the use of noncertificated staff, such as aides, to fill the positions of teaching staff, such as librarians, would violate State law and would not provide the needed skills. The undersigned is not persuaded that teaching personnel are needed full time at each library, particularly at the elementary school level. Thus, it is recommended that full-time librarians be hired on the basis of one for every three elementary schools,

with aides hired to satisfy the remaining staffing needs at the libraries throughout the school system. The undersigned recommends approval of the budget request for the secondary schools. The City Board should amend these budget items to reflect this recommendation.

The State defendants object to the number of nurses requested by the City Board, which seeks approval of one full-time nurse for each middle and high school and one full-time nurse for each 500 students enrolled at the elementary school level. The City Board asserts that its request is based upon the "health and welfare of students" attending city schools. The City Board points out that the State Handbook for Classification leaves the actual number of nurses to the discretion of the individual school district, and that the City of St. Louis itself does not provide any health care to the students in the City's public school system. James Bliss, State Director of School Finances, testified that the State would agree to provide twenty nurses for this program. Not convinced that the State's suggestion will satisfy the apparent needs of the city's public school system in its desegregation efforts, the undersigned will recommend the approval of City Board's original request.

State defendants object to two requests on the ground that the programs cannot be fully implemented within the 1983-1984 year, and the budgets should be reduced by one-half the amount requested. These are the budget entries for the staff development unit and a parental involvement program. Both of these programs are among those listed by the District Court for prompt consideration. In light of the City Board's acknowledgment that it may not be able to fully implement all programs and the fact that the budgets reflect estimates of the maximum expenditures for any given program, the undersigned is not persuaded that the State defendants' generalized assertion that these proposals cannot be fully implemented should bar approval of the proposed budgets. Thus, these requests should be approved. If the programs are not implemented, there need be no payment for them.

The State defendants object to a request for $32,000 for postage as part of a program to strengthen the public affairs office. The undersigned agrees with the State defendants that much of the public information to parents may be disseminated through delivery of materials to the students, to the schools' parent groups, and similar organizations. This method would reduce the cost of each mailing by $2,000, as estimated by City Board. City Board Ex. 1, page 67. Therefore, the undersigned will recommend approval of the State's request that this amount be reduced by one-half.

The State defendants object to each line item 99 "Inflation Contingency" throughout the City Board's budget. The State defendants argue that this is not a valid line item because it does not show specifically how the City Board would spend such funds. Dr. Bliss testified that "a budget is a control tool" and this is a "noncontrol item." *See* financial adviser's report at 2; *see also* the City Board's post hearing memorandum, H(2587)83 at 16 ("the approved budget serves as a cap for that year"). The City Board and the State partially resolved this dispute by increasing various employee salary and benefit items by eight percent. *See* Joint Report, H(2547)83 at 33. Even with this compromise, a dispute remains regarding a total of $1,416,071 for this line item, or an eight percent inflation factor for non-salary items.

The financial adviser stated that

> It is not customary to include an inflation contingency in public school accounting, either for individual budget components or for the budget as a whole. Use of a 'reserve for contingencies' is practiced in the private sector but not in public accounting. When developing a budget for Board approval, school officials generally propose each expenditure item as it is expected to occur during the fiscal year in which it is to be spent.

Financial adviser's report at 2. Although the financial adviser notes that the City Board is free to seek adjustments from the State or the Court, the City Board points out that the approved budget constitutes a "cap" on expenditures for any given year, and that returning to the Court for budget adjustments is not the usual practice in this case. City Board post hearing memorandum at 16. The undersigned does not want to burden the District Court with further budget requests this year. However, the State's concern with auditing and the financial adviser's concern with accountability are legitimate, reasonable concerns which should be sustained. The undersigned will therefore recommend that the Court not approve any remaining disputed amount for the "inflation contingency" line item.

Finally, the State defendants argue against approval of object code 21, "not otherwise classified," which is included in some components of the City Board's budget. State defendants object to these line items because the purposes of the expenditures are not disclosed. After certain disclosures were made, it was stated at the hearing that the State defendants agreed to certain proposed expenditures for this object code. Any post-hearing agreement on these items has not been submitted to the Court. The undersigned recommends that the District Court approve amounts to which there is agreement, and that the parties submit a joint written statement outlining all areas of agreement and areas of disagreement. The undersigned further recommends that subsequent budgets omit this object code and instead provide for these costs in the most closely associated object code, with an explanation of "not otherwise classified" items within those codes.

The undersigned recognizes that the objections to the proposed budgets, as well as agreement to the various budget items, do not waive the State defendants' objections to future budget or program proposals. Arguments by the State defendants that the District Court overstepped the bounds of its authority in approving the Settlement Plan are more appropriately determined

through a motion to amend, modify or vacate that order, or through an appeal from that order. These arguments have not been considered in this Report and Recommendation.

RECOMMENDATION

The undersigned United States Magistrate concludes and recommends to the District Court that the instant budget disputes be resolved as follows:

(a) the budget requests for Kirkwood's magnet school, Clayton's magnet school, University City's magnet schools, Normandy's magnet schools, and the City Board's Foreign Language Secondary magnet school [City Board Ex. 5 at 56] should be approved for separate payment by the State;

(b) the budget request of Hancock Place School District, for a total of $29,220, should be approved for separate payment by the State as requested;

(c) the budget request of Affton School District, for a total of $35,441.09, should be approved as requested for separate payment by the State;

(d) the budget request of Mehlville School District should be approved for separate payment by the State in the amount of $47,122 for a desegregation coordinator and for workshop expenses; the other costs Mehlville sought should not be approved for separate payment by the State;

(e) the budget request of Hazelwood School District should be approved for separate payment by the State in the amount of $103,771; the other costs Hazelwood sought should not be approved for separate payment by the State;

(f) the amount remaining in dispute in line item "inflation contingency" throughout the City Board's budget should not be approved;

(g) with the deletion of the amount required by paragraph (f) above, all amounts requested by the City Board for full payment by the State may be approved;

(h) the City Board's request for approval of Component A902 of its budget should not be approved except for functions 6903 and 1907, which should be paid under ¶5(c) of the July 5, 1983, order; the balance should be paid under ¶5(d) of the order;

(i) the City Board's request for approval of costs to "restore and increase librarians" [City Board Ex. 6 at 4-5] should be amended and approved to fund one full-time librarian for every three elementary schools, and aides supplying the remaining staffing needs in these schools; and the secondary school budget requests for one media specialist for each secondary school and for .5 librarian should be approved;

(j) the City Board's request for postage for the public affairs program should be approved only for one-half the total amount requested;

(k) the City Board's remaining requests for programs to be funded by the City Board and the State equally should be approved upon deletion of the amount in paragraph (f) above;

(l) the State and the City Board should submit a joint written report reflecting all areas of agreement and areas of disagreement, including the reasons therefor, for each amount noted in the City Board's exhibits 2 and 9, regarding the object code "not otherwise classified;" any amounts remaining in dispute for this object code should be disapproved for this year;

(m) each participating district that submitted a budget to which the State defendants originally objected should file another 1983-1984 budget reflecting the amounts approved through agreement with the State or through court order;

(n) the objections of the Liddell plaintiffs should be overruled; and

(o) the District Court should approve all budget requests to which the relevant parties have agreed.

The parties have ten days to file written objections to this Report and Recommendation. Such objections to the extent possible shall be filed jointly.

Respectfully submitted,

David D. Noce
United States Magistrate

Dated this 18th day of August, 1983.

APPENDIX K

U.S. Court of Appeals
for the Eighth Circuit

Nos. 83-1957, 83-2033, 83-2118, 83-2220, 83-2554

Craton Liddell, Etc., Et Al.,

Appellees,

v.

State of Missouri, Et Al., City of St. Louis,
St. Louis Teachers Union, Local 420, Etc.,
North St. Louis Parents & Citizens for Quality Education,
Et Al.,

Appellants.

Appeals from United States District Court
for the Eastern District of Missouri

No. 83-2140

In re: City of St. Louis, Paul Berra and Ronald A. Leggett,

Petitioner.

Petition for Writ of Prohibition

Submitted: November 28, 1983

Filed: February 8, 1984

Opinion of the Court *En banc,* LAY, Chief Judge, HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, and FAGG, Circuit Judges, with JOHN R. GIBSON, Circuit Judge, concurring in part and dissenting in part, and BOWMAN, Circuit Judge, dissenting.

The Caldwell and Liddell plaintiffs, representing black students and parents of the St. Louis City School District, the City School District, and several suburban school districts have entered into a unique and comprehensive settlement agreement designed to further desegregation in the city schools. The United States District Court has approved the agreement and has entered orders to fund the plan.

With the exceptions and limitations noted in the opinion, we approve the agreement and the order entered by the district court with respect to:

> The voluntary transfers of students between the city and suburban schools and the establishment of additional magnet schools and integrative programs in the City School District as necessary to the successful desegregation of the city schools;
>
> The quality education programs for the nonintegrated schools in the City School District;
>
> The quality education programs for all schools in the City School District, but only insofar as these programs have been shown to be necessary for the city to retain its Class AAA rating or to be essential to the successful desegregation of the city schools as hereinafter set forth;
>
> The provisions of the district court's order requiring the State of Missouri, as the primary constitutional violator, to pay the full cost of city to suburb and suburb to city transfers, magnet schools and integrative programs in the city schools, and one-half of the cost of the quality education programs in the city schools. We decline to approve the district court order insofar as it requires the State to fund student transfers between suburban school districts and to fund magnet schools or integrative programs in those suburban districts;

> Improved facilities for the city schools. We require further planning, however, before construction begins, to identify with particularity the projects that will be undertaken, and to take account of a probable decline in the city school population in the next few years.

We outline the steps that the district court must take before it can require an increase in real estate taxes to fund the City Board's share of the quality education component of the plan without a vote of the people, and the steps that the court must take before it can require that bonds be issued to fund the City Board's share of capital improvements without a similar vote. We make it clear, however, that no party found to have violated the Constitution will be permitted to escape its obligation to provide equal educational opportunity to the black children of St. Louis.

We make it clear that the suburban schools meeting the goals set forth in the plan will receive a final judgment declaring that they have satisfied their desegregation obligations.

Finally, we recognize that the settlement agreement and the district court's order will have to be modified to conform to this opinion, and we are aware that the cost of the plan, particularly to the State, will be significantly reduced. In our view, however, the changes do not alter the essential character of the plan, and they preserve its constitutionality. The parties to the settlement agreement are required to decide promptly whether they will accept the changes set forth in this opinion. If they refuse to do so, the interdistrict trial will proceed.

I. PROCEDURAL HISTORY.

In February, 1972, a group of black parents (the Liddell plaintiffs) filed a class action against the City Board, the board members, and school administrators, alleging racial segregation in the city's schools in violation of the fourteenth amendment. The defendants' motion to join the State of Missouri and St.

Louis County (containing the suburban school districts) as codefendants was denied on December 1, 1973. A year later, the parties entered into a consent agreement which provided for an increase in the number of minority teachers and included a pledge by the City Board to attempt to "relieve the residence-based racial imbalance in the City schools." *Liddell v. Bd. of Educ.*, 469 F. Supp. 1304, 1310 (E.D. Mo. 1979).

The case first came before this Court in 1976,[1] when the Caldwell plaintiffs appealed the district court's denial of their right to intervene. We granted intervention, but declined to pass on the constitutionality of the consent decree. *Liddell v. Caldwell,* 546 F.2d 768 (8th Cir.) (*Liddell I*), *cert. denied,* 433 U.S. 914 (1976). We encouraged the United States and State of Missouri to intervene, recommended the creation of a biracial citizens committee to assist in formulating a desegregation plan, and suggested voluntary interdistrict student transfers as one remedial tool. *Id.* at 774.

Desegregation plans were developed and submitted to the district court by the City Board, the Liddell plaintiffs, the Caldwell plaintiffs, and the United States as amicus curiae. Before approving any plan, the district court ordered a trial to determine whether there had been a constitutional violation and to frame a remedy if a violation was found. The United States, the City of St. Louis, and two white citizens' groups were allowed to intervene as plaintiffs. The State of Missouri, the State Board of Education, and the Commissioner of Education were added as defendants. The district court found no constitutional violation, and held that the City Board had achieved a unitary school system in 1954-56 through its "neighborhood school policy." *Liddell v. Bd. of Educ., supra,* 469 F. Supp. at 1360-1361.

---

[1] We recounted the procedural history of this litigation in *Liddell v. Bd. of Educ.*, 677 F.2d 626, 628 n.1 (8th Cir. 1982) (*Liddell V*), *cert. denied,* 103 S. Ct. 172 (1983) and *Adams v. United States,* 620 F.2d 1277, 1281-1283 (8th Cir.), *cert. denied,* 449 U.S. 826 (1980).

We reversed the district court in *Adams v. United States,* 620 F.2d 1277 (8th Cir.) (*en banc*), *cert. denied,* 449 U.S. 826 (1980),[2] holding that the City Board and the State were jointly responsible for maintaining a segregated school system. In reaching this decision, we noted that the Missouri State Constitution had mandated separate schools for "white and colored children" through 1976, that the State had not taken prompt and effective steps to desegregate the city schools after *Brown v. Bd. of Educ.,* 347 U.S. 483 (1954) (*Brown I*), and that the City Board's policies and practices since 1956 had contributed to the existing segregation. We remanded to the district court and directed that the schools be promptly desegregated. We suggested the following techniques:

> (1) Developing and implementing compensatory and remedial educational programs. * * *
>
> (2) Developing and implementing programs providing less than full-time integrated learning experiences.
>
> (3) Developing and implementing a comprehensive program of exchanging and transferring students with the suburban school districts of St. Louis County. * * *
>
> (4) Maintaining existing magnet and specialty schools, and establishing such additional schools as needed to expand opportunities for an integrated education.
>
> (5) Establishing an Educational Park.
>
> (6) Continuing and expanding a policy of permissive transfers in the district.

Adams v. United States, supra, 620 F.2d at 1296-1297 (citations omitted).

---

[2] We also ruled on several procedural questions in the interim between *Liddell I* and *Adams, see Liddell v. Caldwell,* 553 F.2d 557 (8th Cir. 1977) (*Liddell II*).

After holding extensive evidentiary hearings, the district court approved a system-wide desegregation plan for the city schools beginning with the 1980-81 school year. *Liddell v. Bd. of Educ.*, 491 F. Supp. 351 (E.D. Mo. 1980). This plan included a comprehensive program of exchanging and transferring students between the city and suburban schools, the establishment of magnet schools and integrative programs, and a quality education component. In approving the plan, the district court concluded:

> In sum, the State defendants stand before the Court as primary constitutional wrongdoers who have abdicated their affirmative remedial duty. Their efforts to pass the buck among themselves and to other state instrumentalities must be rejected[.]

Id. at 359.

We affirmed the district court's plan on appeal. *Liddell v. Bd. of Educ.*, 667 F.2d 643 (8th Cir. 1981) (*Liddell III*), *cert. denied*, 454 U.S. 1081, 1091 (1982). In so doing, we decided that it was constitutionally permissible to allow a number of all-black schools to remain in the city. We noted that no all-white schools would remain, that a plan of voluntary interdistrict transfers would be initiated, that magnet schools and integrative programs would be established, and that a substantial part of the desegregation budget would be spent to improve the quality of education in the all-black schools. We affirmed the State's liability for desegregation costs and remanded for continued implementation of the plan.

Questions about this plan's implementation came before us in early 1982, when the State again protested its liability for certain desegregation costs. *Liddell v. Bd. of Educ.*, 677 F.2d 626 (8th Cir.) (*Liddell V*), *cert. denied*, 103 S. Ct. 172 (1982).[3] We affirmed the district court's allocation of costs, placing one-half

---

[3] We issued a procedural order in the interim. *Liddell v. Bd. of Educ.*, 693 F.2d 721 (8th Cir. 1981) (*Liddell IV*).

of the actual desegregation costs on the State. We also required the State to pay the costs of voluntary interdistrict transfers and the costs of merging city and county vocational educational programs. Meanwhile, the City Board and the Liddell and Caldwell plaintiffs continued to seek the consolidation of the city and county schools into a single integrated school district on the theory that the suburban schools had also violated the Constitution. They successfully moved to add the county school districts and St. Louis County officials as defendants to this litigation. We noted that the suburban schools could not be held as constitutional violators without further evidentiary hearings and findings by the district court. We again noted that the State and City Board—already adjudged violators of the Constitution—could be required to fund measures designed to eradicate the remaining vestiges of segregation in the city schools, including measures which involved the voluntary participation of the suburban schools. *Liddell V, supra,* 677 F.2d at 641.[4]

The district court entered an order on August 6, 1982, which disclosed the mandatory interdistrict plan it would impose in the event the suburban school districts were found liable for constitutional violations. This plan would create one unified metropolitan school district with a uniform tax rate. The court then scheduled interdistrict liability hearings.

---

[4] We suggested that

> the district court could (1) require the state and the city to take additional steps to improve the quality of the remaining all-black schools in the City of St. Louis; (2) require that additional magnet schools be established at state expense within the city or in suburban school districts with the consent of the suburban districts where the schools would be located; (3) require that additional part-time programs be established at state expense to provide for more integrative experiences for students in all-black city schools, including programs which would involve voluntary participation by suburban schools; and (4) require the state to provide additional incentives for voluntary interdistrict transfer.

Liddell V, supra, 677 F.2d at 641-642 (footnote omitted).

Before these hearings were held, however, the City Board, the Liddell plaintiffs, the Caldwell plaintiffs, and all twenty-three county school districts developed a settlement agreement with the assistance of a court-appointed expert and filed a proposed consent decree on March 30, 1983. This agreement settled the plaintiffs' interdistrict claims against the county school districts, and also enabled the State and City Board to take important steps to desegregate the city schools through the voluntary participation of the county schools, as we outlined in *Liddell V.*

The settlement plan has several components. It provides for voluntary interdistrict transfers between city and suburban schools and includes fiscal incentives to encourage these transfers. Each county school district which receives enough transfers within five years to satisfy its desegregation obligations under the plan will receive a final judgment. Affirmative hiring requirements and voluntary teacher transfers are included in the plan to assure it will have a substantial impact in the county schools. To attract white student transfers to the city, and also to provide remedial programs for city students, the plan creates additional magnet schools in the city and the county, and has several compensatory and remedial education components. These latter components are designed to improve the quality of education in the city schools, and to make special improvements in the all-black schools.

After the parties filed the settlement agreement, the district court conducted hearings in April and May of 1983 to determine whether the settlement plan is fair, reasonable, and adequate. In its July 5, 1983, order, the court concluded the plan met these standards and allocated the costs of the plan between the State and City Board. *Liddell v. Bd. of Educ.*, 567 F. Supp. 1037 (E.D. Mo. 1983). The State is totally responsible for the costs of the voluntary interdistrict transfers, the magnet schools, and various part-time and alternative integrative programs. Further, the State will pay one-half of the cost of the quality improvements in the city schools and one-half of the capital improvements required by the plan. The City Board is required to pay the remaining costs.

The district court ordered the City Board to submit a bond issue to its voters before February 1, 1984, to fund its share of the capital improvements required under the plan. In the event this bond issue failed to obtain the necessary two-thirds vote the court reserved authority to consider an appropriate order to fund these capital improvements.[5] The district court also deferred a scheduled reduction in the City Board's operating levy otherwise required by Mo. Rev. Stat. § 164.013 (Proposition C) insofar as this revenue is necessary to fund the City Board's share of desegregation costs. It further reserved authority to order an increase in the City Board's property tax rate, following notice and a hearing on the amount, if the revenue necessary to fund the City Board's constitutional obligation to desegregate the city schools is not otherwise available.

Several weeks after the district court entered its order approving the settlement, the State filed a motion to stay the implementation of the plan. The City of St. Louis filed a petition for a writ of prohibition seeking the same result. The district court denied both of these motions, and the State and City of St. Louis appealed to our Court. In an en banc order, *Liddell v. Missouri,* 717 F.2d 1180 (8th Cir. 1983) (*Liddell VI*), we denied the stay with certain exceptions. We froze the number of interdistrict transfers and deferred any further district court action concerning the City Board's property tax rate. We also deferred action on the writ of prohibition until we considered the case on its merits.

Appeals were filed from the district court's July 5, 1983, order by the State of Missouri, the City of St. Louis, the North St. Louis Parents and Citizens for Quality Education, and the St. Louis Teachers Union.

---

[5] The two-thirds majority is required by Mo. Const. art. VI, § 26(b). This bond issue election was held on November 8, 1983, and it failed, receiving fifty-five percent voter approval.

The State contends on appeal that the district court erred: (1) in approving additional interdistrict transfers of students, and requiring the State to pay the full cost of the additional transfers; (2) in approving additional magnet schools and part-time integrative programs, and requiring the State to pay their full cost; (3) in approving certain programs to improve the quality of education in the city schools, and requiring the State to pay one-half the cost of these programs; and (4) in ordering a deferral of scheduled property tax reduction for the city schools, and in stating that it would order a further increase in property taxes to fund the City Board's share of the cost of the quality education programs in the city schools.

The City of St. Louis joins in questioning the authority of the district court to enter the taxing order referred to in (4) above.

The St. Louis Teachers Union contends that the district court erred in denying its motion to intervene.

The Northside Parents Organization contends that the district court erred in failing to provide more extensive relief to the black students who would remain in the nonintegrated schools.

The United States did not file a notice of appeal or cross-appeal. It did file a brief and it was permitted to argue its position before the Court *en banc*. It appears to argue that many of the programs authorized by the district court may be necessary to desegregate the city schools, but questions whether the district court's factual findings are sufficient to support all aspects of the district court's remedial order. It asks this Court to remand to the district court to correct the alleged deficiencies.[6]

---

[6] We question whether the United States should be heard as a party. Parties who do not appeal from a trial court judgment cannot be heard to attack that judgment, either to enlarge their own rights, or to lessen the rights of their adversary. *See Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 190-191 (1937); *United States*

II. INTERDISTRICT TRANSFERS.

On July 2, 1981, the district court entered an order authorizing voluntary interdistrict transfers and requiring the State to pay the cost of the transfers. The program was initiated at the beginning of the 1981-82 school year, and by the end of the 1982-83 school year, it had grown so that 873 city students were attending county schools and 318 county students were attending city schools. All but seven of the 318 were enrolled in city magnet schools. The State of Missouri paid the cost of these transfers, including transportation costs and fiscal incentives, to the sending and receiving schools.

The settlement agreement calls for an expanded program of interdistrict transfers. City-to-county transfers of black students will be permitted to grow incrementally until they reach 15,000. No limit is placed on the county-to-city transfers, but the number is not expected to exceed 3,000. These transfers are expected to be primarily to city magnet schools and programs. Transfers between county districts are also permitted. All student transfers are voluntary.

The State's funding obligations remain as they were under the July 2, 1981, order: It must pay transportation costs and must pay to the receiving district for each transferring student an amount equal to the receiving district's cost per pupil, less State aid and trust fund allocation. It is further required to provide fiscal incentives to sending districts which may elect payment

---

v. American Railway Express Co., 265 U.S. 425, 435 (1924); *Stella v. DePaul Community Health Center, Inc.*, 642 F.2d 258, 261 (8th Cir. 1981); *Johnson v. United States Fire Ins. Co.*, 586 F.2d 1291, 1294 n.7 (8th Cir. 1978); *Tiedeman v. Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 513 F.2d 1267, 1271-1273 (8th Cir. 1975).

Here, the United States is requesting that the district court's order be vacated and that the case be remanded for further findings. This result would "lessen the rights" of the parties to the settlement agreement. In practical terms, however, we have considered the United States's position as an amicus curiae.

under one of two formulas: either one-half of the State aid the district would have received had the student not transferred; or, beginning in 1984-85, if a district sends more students than it receives, State aid based on the district's enrollment for the second prior year. To be eligible for transfer, students of good standing must be in the racial majority in their home districts and must transfer to districts where they would be in the racial minority.

After approval of the settlement agreement, transfers rose dramatically. During the current school year, 2,294 city students have transferred to suburban districts and three hundred and eighty-nine suburban students have transferred to city schools. Thirty-four suburban students have transferred to other suburban districts. One thousand nine-hundred and sixty-five additional city-to-county transfer applications are on file.

The settlement agreement provides that participating districts will receive a final judgment releasing them from further liability if they achieve the plan ratio[7] within five years. Litigation is stayed during this period. If the school district does not reach the plan ratio, litigation can be renewed after first pursuing various negotiating procedures. If the liability of any individual school district is litigated, the plaintiffs must prove liability and may not seek reorganization or consolidation of school districts, nor may they seek a minority enrollment exceeding twenty-five percent of the school district.

---

[7] Under the Plan Ratio, * * * a suburban school district would accept up to as many black transfer students as would constitute 15 percent of the total student population in that district, but no suburban school district would be required to accept more black transfer students than would raise the overall percentage of blacks in the total student population higher than 25 percent.

Settlement Agreement, I-2.

The State argues that the district court order approving the settlement agreement and requiring the State to pay the full cost of interdistrict transfers cannot be sustained because it imposes an interdistrict remedy based on an intradistrict violation. We disagree for two reasons: First, the issue has previously been decided adversely to the State; second, the interdistrict transfers are intrinsic to an effective remedy for the intradistrict violation and are justified by precedent.

A. THE PROPRIETY OF THE DISTRICT COURT'S ORDER WITH RESPECT TO INTERDISTRICT TRANSFERS HAS BEEN PREVIOUSLY DECIDED.

This Court has repeatedly authorized the interdistrict transfer of students as a fundamental element of an effective remedy for the unconstitutional segregation of the city schools. In *Adams v. United States, supra,* 620 F.2d at 1296, we specifically approved the development and implementation of "a comprehensive program of exchanging and transferring students with the suburban school districts of St. Louis County."

In *Liddell III, supra,* 667 F.2d at 650, we rejected the State's argument that the district court was without authority to formulate an interdistrict plan without finding an interdistrict violation. We also noted that voluntary interdistrict pupil exchanges "must be viewed as a valid part of the attempt to fashion a workable remedy within the City." *Id.* at 651. In an order appended to that opinion, we noted that the State had been "judicially determined to be a primary constitutional violator," and we held that an interdistrict transfer plan would be salutary and would be entirely enforceable against the State. *Id.* at 659.

Finally, in *Liddell V, supra,* 677 F.2d at 630, we reiterated our conclusion that, because the State had been found a primary constitutional wrongdoer, it can "be required to take those actions which will further the desegregation of the city schools

even if the actions required will occur outside the boundaries of the city school district." After discussing broad-based interdistrict proposals and dismissing them as unsuitable, we addressed the proper limits of the district court's equitable remedial authority:

> [T]he district court can require the existing defendants—the state and city school board—to take the actions which will help eradicate the remaining vestiges of the government-imposed school segregation in the city schools, including actions which may involve the voluntary participation of the suburban schools. For example, the district court could * * * (4) require the state to provide additional incentives for voluntary interdistrict transfer.

Id. at 641-642 (footnote omitted).

We did not act hastily or arbitrarily in approving voluntary interdistrict transfers. We outlined the reasons for our decision in *Adams v. United States, supra,* 620 F.2d at 1291-1297. We reviewed the parties' proposed remedial alternatives, several of which involved extensive cross-busing between city schools. The Caldwell plaintiffs proposed a seventy-five percent black/twenty-five percent white racial mix within the district. The Liddell plaintiffs, through their expert witness, Dr. David Colton, proposed a four-tier division of the schools by age groups, which would integrate schools above fourth grade to achieve a sixty percent/forty percent or fifty-five percent ratio of black to white students. All whites above third grade would attend integrated schools and all blacks would receive at least one-third of their education above third grade in integrated schools. The Department of Justice, through its expert witness, Dr. Gary Orfield, proposed maintenance and expansion of integration in all grades, voluntary interdistrict and intradistrict transfers, magnet schools, integration of personnel, and community involvement. The Board of Education proposed the creation of integrated junior high schools which would funnel

students to high schools in a balanced fashion. Magnet schools would supplement these junior high schools. The white parents proposed that the schools be left as they were or, alternatively, that the city and county schools be merged and a comprehensive plan for interdistrict student transfers be developed.

Of the four plans submitted by the parties, we found that only the Colton and Orfield plans were constitutionally permissible. We rejected the City Board's plan as too little too late: elementary schools would remain entirely segregated and desegregation of the upper tiers would be delayed four to seven years. We rejected the Caldwell plan because the record supported the district court's finding that implementation of the plan would probably result in an all-black school system within a few years. We found that the Colton plan was permissible with some substantial changes, but that plan was discarded by the district court after it found that the plan was "educationally unsound" and that it would "fail to achieve effective desegregation." *Liddell v. Bd. of Educ., supra,* 491 F. Supp. at 356.

The approach suggested by the United State's expert, Dr. Orfield, was ultimately adopted by the district court as the plan that held "the promise of providing 'the greatest possible degree of actual desegregation, taking into account the practicalities of the situation.' " *Id.* at 359, citing *Davis v. Bd. of School Comm'rs,* 402 U.S. 33, 37 (1971). We reaffirmed our support of the Orfield plan in *Liddell III, supra,* 667 F.2d at 649-653. We noted that it was the only constitutionally permissible plan submitted that could achieve stable, effective integration while minimizing transportation of students and maintaining integrated schools in integrated neighborhoods. *Id.* at 650.

The State defendants have raised the question of remedial scope twice before the Supreme Court. On June 17, 1981, the State filed a petition for certiorari from our panel opinion in *Liddell III.* In that petition, the State argued that there was no basis for State liability:

> The evidence in this case indicates that the State of Missouri took the necessary and appropriate steps to remove the legal underpinnings of segregated schooling as well as affirmatively prohibiting such discrimination.

State's Petition for Certiorari, No. 80-2152, June 17, 1981, at 17.

It further argued:

> The District Court exceeded its authority in ordering the preparation of a plan of voluntary pupil exchanges between the St. Louis School District and nonparty school districts because (1) an interdistrict violation has neither been pleaded nor proven, and (2) the District Court cannot, consistent with *Milliken v. Bradley,* order the State of Missouri to fund such a voluntary plan simply on the basis of an intradistrict violation.

Id. at 20.

The Supreme Court denied certiorari. *Missouri v. Liddell,* 454 U.S. 1091 (1981).

Not satisfied with this answer, the State raised the same arguments again before our Court in *Liddell IV* and *Liddell V.* Unsuccessful in our Court, the State filed a second petition for certiorari with the Supreme Court on April 30, 1982. The State again argued that

> ordering an inter-district remedy [the 12(a) voluntary transfers, funded by the State] without first finding an inter-district violation and inter-district effect is in conflict with this court's decision in *Milliken v. Bradley I* [and *Hills v. Gautreaux*].

State's Petition for Certiorari, No. 81-2022, April 30, 1982, at 7; *see also id.* at 10.

Again, the Supreme Court denied certiorari. *Missouri v. Liddell,* 103 S. Ct. 172 (1982). Both of the State's petitions for certiorari came after the Supreme Court's decision in *Hills v. Gautreaux,* 425 U.S. 284 (1976).[1]

As a result of our previous holdings and of the Supreme Court's inaction, the use of interdistrict transfers is settled as law of the case. While this doctrine does not foreclose this Court from correcting its errors, it prevents repeated litigation of the same issue and promotes uniformity of decision. *In Re Exterior Siding and Aluminum Coil Antitrust Litigation,* 696 F.2d 613, 616 (8th Cir. 1982), *vacated en banc,* 705 F.2d 980 (8th Cir. 1983), *cert. denied,* 104 S. Ct. 204 (1983). We will reconsider a previously decided issue only on a showing of clear error and manifest injustice. *United States v. Unger,* 700 F.2d 445, 450 n.10 (8th Cir.), *cert. denied,* 104 S. Ct. 339 (1983); *Wrist-Rocket Mfg. v. Saunders Archery Co.,* 578 F.2d 727, 730-731 (8th Cir. 1978).

We are loath to retract our previous declarations on settled issues when a case returns on appeal; to do so ignores important considerations of judicial economy and ignores our interest in protecting the settled expectations of parties who have conformed their conduct to our guidelines. In this case, our conclusions that State-funded interdistrict transfers are an appropriate remedy is strengthened by our previous invocation of the law of the case doctrine. *Liddell V, supra,* 677 F.2d at 629-630.

The State argues that we should not be bound by our earlier decisions because the magnitude of the proposed plan, with

---

[1] Although denial of certiorari does not necessarily imply approval of the decision below on the merits, this Court has recognized that denial of certiorari is, under some circumstances, a fact which "cannot be overlooked." *Wells v. Meyer's Bakery,* 561 F.2d 1268, 1274-1275 (8th Cir. 1977). *See also United States v. Kras,* 409 U.S. 434, 443 (1973); *United States v. Thompson,* 685 F.2d 993, 999 (6th Cir.), *cert. denied,* 103 S. Ct. 494 (1982).

respect both to cost and numbers of students, distinguishes it from existing plans. Neither this Court nor the district court placed any limitation on the number of students that could transfer under the plan in existence during the last two school years, nor were we requested to do so. Moreover, it was clear that the number of transfers would have to be large if the opportunity for an integrated education was to be provided to a significant number of the 30,000 black students that remained in the all-black schools in the city.

Notwithstanding our view that the issues regarding interdistrict transfers have been heretofore decided, we again reach the merits of the matter and, alternatively, hold that the plan and the funding order, as they relate to interdistrict transfers, meet constitutional standards.

B. THE DISTRICT COURT'S ORDER WITH RESPECT TO INTERDISTRICT TRANSFERS MEETS CONSTITUTIONAL STANDARDS.

Since *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955) (*Brown II*), principles of equity have guided courts in devising remedies to eradicate segregation and its effects. Yet for equitable remedies to pass constitutional muster, they must conform to three overlapping criteria.

> [First], the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. * * * The remedy must therefore be related to "the *condition* alleged to offend the Constitution." * * * Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." * * * Third, the federal courts * * * must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.

Milliken v. Bradley, 433 U.S. 267, 280-281 (1977) (*Milliken II*) (citations and footnotes omitted).

Examination of voluntary interdistrict transfers confirms that, as a remedy for an intradistrict violation, such transfers comply with constitutional standards.

1. The remedy was closely tailored to the nature and scope of the violation.

The Missouri Constitution requires the State to provide a free public education. Mo. Const. art. 9, § 1(a). The State supervises instruction, distributes funds for public education to local school districts, approves school bus routes, provides free textbooks, and passes on applications by school districts for federal aid. *See* Mo. Rev. Stat. §§ 161.092, 163.021, 163.031, 163.161, 170.051, 170.055; and *Liddell v. Bd. of Educ., supra,* 469 F. Supp. at 1313-1314.

Before the Civil War, Missouri prohibited the creation of schools to teach reading and writing to blacks. Act of February 16, 1847, § 1, 1847 Mo. Laws 103. State-mandated segregation was first imposed in the 1865 Constitution, Article IX § 2. It was reincorporated in the Missouri Constitution of 1945: Article IX specifically provided that separate schools were to be maintained for "white and colored children."[9] In 1952, the Missouri Supreme Court upheld the constitutionality of Article IX under the United States Constitution. *See State ex rel. Hobby v. Disman,* 250 S.W.2d 137, 141 (Mo. 1952). Article IX was not repealed until 1976. *Adams v. United States, supra,* 620 F.2d at 1280. Under the segregated system, the State bused suburban black students from St. Louis County into the city's black schools to maintain the dual system. *Id.,* at 1281. The city schools remained largely segregated until this Court's decision in *Adams.*

---

[9] In addition, state law provided separate libraries, public parks, and playgrounds "for the use of white and colored persons," Mo. Rev. Stat. 10474 (1939), and established separate "institutes for colored teachers," Mo. Rev. Stat. 10632 (1939).

It is clear from the foregoing that the State's presence in public education is immense and that the State's Constitution and statutes mandated discrimination against black St. Louis students on the broadest possible basis. It is equally clear that the discriminatory policies continued after the Supreme Court decided *Brown I, supra,* in 1954. Given the breadth of the State's violation, it was appropriate for the district court to mandate an equally comprehensive remedy. The potential for integration within the district, however, was limited by the fact that almost eighty percent of the students were black, and by the district court's finding that if it integrated the city schools by imposing an eighty/twenty ratio in each school, an all-black school system would probably result. With that in mind, the district court properly considered the alternative of voluntary transfers to county districts. The opportunity for effective integration became a reality when the county schools agreed to accept the voluntary transfer of several thousand black students.[10]

2. The remedy restores the victims of discrimination as nearly as possible to the position they would have occupied absent that discrimination.

We have heretofore enumerated the alternative remedies suggested by the parties, and we have explained why the district court selected a remedy which included voluntary interdistrict transfers and why this Court approved that remedy. (*See supra* pp. 25-26.)

We are met for the first time on this appeal with a new, or at least a more precisely framed, argument against interdistrict transfers. The State asserts that the district court cannot require the State to fund extensive interdistrict transfers unless the

---

[10] We also note that the remedial limits imposed by *Dayton Bd. of Educ. v. Brinkman,* 433 U.S. 406 (1977), are inapposite to this case. The findings of *de jure* segregation which distinguish this case were absent in *Dayton.* In that case, the Supreme Court considered the proper scope of an equitable remedy for three isolated instances of discrimination.

record supports and the district court finds that the black children of St. Louis would have attended schools in the county had it not been for the State's constitutional prohibition against black and white students attending schools together.[11] Nothing in the cases cited by the State[12] suggests or requires us to hold that the district court abused its discretion when it required the State to fund interdistrict transfers of students to consenting districts. Indeed *Milliken II* states that the remedy should correct conditions that "flow from such a violation" and should return victims "to the position they would have enjoyed in terms of education," but for the violation. *Milliken II, supra,* 433 U.S. at 282. This remedy does precisely that: It returns the largest number of victims to integrated schools and provides integrative opportunities and compensatory and remedial programs for those who cannot participate in the transfer plan. As the primary constitutional violator, the State is in no position to complain that some of the victims may elect to transfer to integrated schools in another school district that is willing to accept them.

---

[11] The United States joins in this argument. In earlier proceedings before this Court and the United States Supreme Court, however, it supported the district court's remedial use of voluntary interdistrict transfers. It argued that voluntary interdistrict transfers properly remedied the State's violation, distinguishing them from the overbroad remedy in *Milliken I,* which involved "*Imposition* of relief upon non-party school districts." It asserted that the district court can "order those who have been found liable to make efforts to *persuade* those nonparty districts to cooperate voluntarily." U.S. Brief in Opposition to State's Petition for Certiorari, *Missouri v. Liddell,* No. 80-2152, Aug. 17, 1971, at 14 (emphasis in original).

In a subsequent brief, the United States again distinguished the interdistrict transfers from the impermissible interdistrict remedy in *Milliken I.* Moreover, in endorsing interdistrict transfers, it stated that, under *Hills,* "the State parties can and should be required to take appropriate remedial action for the constitutional violations in which they participated." U.S. Brief in Opposition to the State's Petition for Certiorari, *Missouri v. Liddell,* No. 81-2022, April 30, 1982, at 7,8.

[12] *Dayton Bd. of Educ. v. Brinkman,* 434 U.S. 526 (1979)(*Dayton II*); *Columbus Bd. of Educ. v. Penick,* 443 U.S. 449 (1979); *School*

In our view, *Hills v. Gautreaux* provides precedent for the remedy mandated by the district court. In that case, the Supreme Court considered a remedy against the United States Department of Housing and Urban Development (HUD) for discrimination in public housing in the City of Chicago. The United States Court of Appeals for the Seventh Circuit had reversed the district court's dismissal and ordered the district court on remand to enter summary judgment against HUD for violations of the Fifth Amendment and the Civil Rights Act of 1964 by knowingly sanctioning and assisting the Chicago Housing Authority's (CHA) racially discriminatory public housing program. *Hills v. Gautreaux, supra,* 425 U.S. at 291-292. Thereafter, the plaintiffs requested that the district court require HUD to provide public housing outside Chicago's city limits. The district court refused, holding that the wrongs were committed solely against city residents and within the city's boundaries.

On appeal, the Court of Appeals for the Seventh Circuit reversed and the Supreme Court affirmed. The Supreme Court stated:

> We reject the contention that, since HUD's constitutional and statutory violations were committed in Chicago, *Milliken* precludes an order against HUD that will affect its conduct in the greater metropolitan area. The critical distinction between HUD and the suburban school districts in *Milliken* is that HUD has been found to have violated the Constitution. That violation provided the necessary predicate for the entry of a remedial order against HUD and, indeed, imposed a duty on the District Court to grant appropriate relief. * * * Our prior decisions counsel that in

---

District of Omaha v. United States, 433 U.S. 667 (1977); *Dayton Bd. of Educ. v. Brinkman,* 433 U.S. 406 (1977); *Milliken v. Bradley,* 433 U.S. 267 (1977) (*Milliken II*); *Pasadena City Bd. of Educ. v. Spangler,* 427 U.S. 424 (1976); *Washington v. Davis,* 426 U.S. 229 (1976); *Keyes v. School Dist. No. 1,* 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1 (1971).

> the event of a constitutional violation "all reasonable methods be available to formulate an effective remedy," *North Carolina State Board of Education v. Swann,* 402 U.S. 43, 46, and that every effort should be made by a federal court to employ those methods "to achieve the greatest possible degree of [relief], taking into account the practicalities of the situation." *Davis v. School Comm'rs of Mobile County,* 402 U.S. 33, 37. As the Court observed in *Swann v. Charlotte-Mecklenburg Board of Education:* "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."

Hills v. Gautreaux, supra, 425 U.S. at 297 (emphasis added; citations omitted).

The Supreme Court then discussed *Milliken v. Bradley,* 418 U.S. 717 (1974) (*Milliken I*), and the limitation it imposed on the scope of the federal courts' equity powers. In *Milliken I,* the respondents alleged that the Detroit school system was racially segregated and they sought the creation of a unified school district as a remedy. Without finding constitutional violations by the suburban districts and without finding significant segregative effects in those districts, the district court ordered the consolidation of the Detroit school system with fifty-three independent suburban school districts. After the Court of Appeals for the Sixth Circuit affirmed this desegregation order, the Supreme Court reversed, holding that the order exceeded the district court's equitable powers: the courts must tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." *Id.* at 744.

In evaluating the remedy in *Hills* according to *Milliken I's standards, the Supreme Court noted that nothing in Milliken I* "suggests a *per se* rule that the federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the ci-

ty where the violation occurred." *Hills v. Gautreaux, supra,* 425 U.S. at 298 (footnote omitted). In *Hills,* the Supreme Court approved the remedy because it did not coerce uninvolved governmental units and because CHA and HUD had the authority to operate outside Chicago's city limits. *Id.*

Justification for requiring the State to fund transfers between city and county schools is stronger than the justification for the remedy in *Hills.* Its role in education is much broader than HUD's role in housing. *See supra* p. 30. In addition, the breadth, gravity and duration of the State's violation here was much greater. The violation scarred every student in St. Louis for over five generations and it gained legitimacy through the State Constitution and through the State's preeminent role in education. In following the Supreme Court's guidelines in *Hills,* we echo its conclusion concerning *Milliken I.* If we barred the use of interdistrict transfers solely because the State's consitutional limitation took place within the city limits of St. Louis, we would transform

> *Milliken [I]'s* principled limitation on the exercise of federal judicial authority into an arbitrary and mechanical shield for those found to have engaged in unconstitutional conduct.

Hills v. Gautreaux, supra, 425 U.S. at 300.

> 3. The district court's order with respect to interdistrict transfers does not infringe on State or local government autonomy.

The Supreme Court in *Hills v. Gautreaux, supra,* 425 U.S. at 298, has interpreted *Milliken I* to mean that district courts may not restructure or coerce local governments or their subdivisions. This remedy does not threaten the autonomy of local school districts; no district will be coerced or reorganized and all districts retain the rights and powers accorded them by state and federal laws. *See Hills v. Gautreaux, supra,* 425 U.S. at 305-306.

We also find unpersuasive the State's argument that funding this remedy will compel other budget cuts, which would interfere with the autonomy of state and local governments. If we accepted this argument, violators of the Constitution could avoid their remedial responsibility through manipulation of their budgets, leaving victims without redress. Simply put, parsimony is no barrier to a constitutional remedy; "it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Watson v. Memphis,* 373 U.S. 526, 537 (1963).[13]

Interdistrict transfers between the city and the county schools may proceed pursuant to the settlement agreement, subject to the following exceptions:

> (1) No additional transfers will be permitted for the balance of the current school year. Such transfers would disrupt the education of students in both sending and receiving schools. Planning and recruitment may continue so that enrollment may reach the levels contemplated in the settlement agreement.
>
> (2) City-to-county transfers will be limited to a total of 6,000 students in the 1984-85 school year and to not more

---

[13] The district court's funding order poses no eleventh amendment problems. The State relies on *Edelman v. Jordan,* 415 U.S. 651, 663 (1974), to avoid its liability for a remedy that requires the expenditure of state funds where that remedy is allegedly overbroad. The Supreme Court in *Milliken II* applied the prospective compliance exception developed in *Ex Parte Young,* 209 U.S. 123 (1908), which "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." *Milliken II, supra,* 433 U.S. at 289. After elucidating the three criteria discussed earlier, the Supreme Court in *Milliken II* found that the plan under review there was constitutional. The interdistrict transfer plan under consideration in this case conforms to the same three criteria.

than 3,000 additional total transfers in each succeeding school year until the limit of 15,000 is reached. A shortfall of enrollment in one year may be made up in succeeding years.

(3) In the event the number of applicants for transfer exceeds the spaces available, priority shall be given to applicants who would otherwise attend an all-black school.

(4) In *Liddell V, supra,* 677 F.2d at 631-632, we warned of the need for vigilance to control the costs of desegregation. Budgetary constraints persist, and so does the need for frugality. We are unwilling, however, to accept the State's suggestion that "complementary zones" to established, which would effectively limit schools that transferees could attend. This would destroy the voluntary nature of the plan. Nevertheless, constant effort and careful planning must be made by all concerned to limit the costs of transportation, insofar as is consistent with the Constitution and the voluntary nature of the plan.

C. COUNTY TO COUNTY TRANSFERS.

Although we approve State funding of transfers of students between the city and county, we are unable to give similar approval to the funding of transfers of students between county districts. We emphasize again that the objective of transfers between the city and county is the eradication of segregation within the city. Such transfers are closely tailored to the violation and are clearly remedial with respect to that violation, according to the standards announced in **Milliken II** which were discussed above. Transfers between county districts, however, are not geared to remedy the violation found within the city. Nor does the record establish that intercounty transfers will materially assist in desegregating the city schools.

We recognize that some suburban school districts have majority black enrollments and others have nearly all-white

enrollments. We acknowledge that the suburban districts would achieve a further degree of desegregation by such transfers. We neither prohibit nor discourage such voluntary transfers between county schools but we cannot compel the State to pay for them absent a finding of an interdistrict violation.

III. MAGNET SCHOOLS AND INTEGRATIVE PROGRAMS.

A. MAGNET SCHOOLS.

The district court and this Court previously authorized the creation of magnet schools and integrative programs. About 8,000 students (one-half of whom were blacks) participated in these schools and programs in the 1982-83 school year. Three hundred participants resided in the county. No one suggests that the magnet schools or integrative programs be discontinued.

The settlement agreement approved by the district court provides for the expansion or replication of existing magnet schools and programs and the development of new magnet schools and programs—in both the city and the county—with total enrollment to reach 20,000 students, twelve to fourteen thousand to be enrolled in city magnets and the balance in county magnets. The new schools would be phased in over the 1983-87 period.

To be eligible for transfer to the magnet schools, students in good standing must be in the racial majority in their home districts and must meet the qualifications for the magnets. Special eligibility requirements allow white students from the city to attend city magnets if the students now attend schools that are less than ten percent or over fifty percent white.[14] Black

---

[14] Our affirmance in this case does not preclude the district court from reconsidering these special requirements—to the extent that they permit a white student attending a school with less than ten percent white enrollment to transfer to a city magnet school—in light of decisions by the Supreme Court and this Court. The district court may reconsider these requirements upon the request of any party.

students in majority black districts are eligible to attend magnet schools and programs in other black majority districts if seats remain open after all of the host district's black students have been accommodated.

The State argues that insufficient attention has been devoted to developing a curriculum designed to attract county students. It also objects to being required to pay the full cost of building and operating the new magnets.

Before reviewing the State's specific arguments, we observe that the utility and propriety of magnets as a desegregation remedy is beyond dispute. In *Adams v. United States, supra,* 620 F.2d at 1296-1297, we evaluated the remedies we had previously found to be constitutionally permissible. We recommended "[m]aintaining existing magnet and specialty schools, and establishing such additional schools as needed to expand opportunities for an integrated education." *Id.* at 1297. We reiterated our approval of magnet schools in *Liddell III, supra,* 667 F.2d at 658 (emphasis omitted), where, in considering an intradistrict remedy, we directed the city and suburban school districts to undertake a "study of the feasibility of establishing magnet schools located in suburban districts with attendance open to students of both the suburbs and the city. * * * The location of these magnet schools should be determined by agreement between the St. Louis Board of Education and the suburban school districts involved." Finally, in *Liddell V, supra,* 677 F.2d at 642, we reaffirmed our conclusion that the district court could "require that additional magnet schools be established at state expense within the city or in suburban school districts with the consent of the suburban districts where the schools would be located." As with interdistrict transfers, our previous determinations in this case concerning magnet schools are law of the case.

Had we not in our previous decisions explicitly examined and approved the use of magnet schools and programs, the weight of precedent would nevertheless oblige us now to approve their

use. In *Milliken II, supra,* 433 U.S. at 272, the Supreme Court mentioned magnet schools as a supplement to the compensatory and remedial programs which it approved in that case. Dissenting in another case, Justice Powell observed that the Supreme Court in *Swann v. Charlotte-Mecklenburg Bd. of Educ., supra,* 402 U.S. at 26-27, implicitly encouraged the use of magnet schools:

> Incentives can be employed to encourage [majority-minority] transfers, such as creation of magnet schools providing special educational benefits and state subsidization of those schools that expand their minority enrollments. * * * These and like plans, if adopted voluntarily by States, also could help counter the effects of racial imbalances between school districts that are beyond the reach of judicial correction.

Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 488 (1979).

This court also approved magnets as a means of desegregating the Little Rock schools in *Clark v. Bd. of Educ. of Little Rock,* 705 F.2d 265, 269, 272 (8th Cir. 1983).

Courts of Appeals in several other circuits have also approved desegregation plans which include magnets. *Arthur v. Nyquist,* 712 F.2d 809, 811-813 (2d Cir. 1983); *Berry v. School District of Benton Harbor,* 698 F.2d 813, 819 (6th Cir.), *cert. denied,* 104 S. Ct. 236 (1983); *United States v. Texas Education Agency,* 679 F.2d 1104, 1110 (5th Cir. 1982); *Hart v. Community School Bd. of Educ.,* 512 F.2d 37, 54-55 (2d Cir. 1975)(citing successful magnet programs in Boston, Massachusetts; Providence, Rhode Island; and Coney Island, New York); *Stout v. Jefferson County Bd. of Educ.,* 483 F.2d 84, 85 (5th Cir. 1973). District courts have also approved plans that include magnets. *Tasby v. Wright,* 520 F. Supp. 683, 741 (N.D. Tex. 1981), *aff'd in part, rev'd in part, on other grounds,* 713 F.2d 90 (5th Cir. 1983); *Smiley v. Blevins,* 514 F. Supp. 1248, 1260 (S.D. Tex. 1981). A survey of the literature reveals that magnets are being used in at least eighteen cities. Rossell, *Magnet Schools as a Desegretation Tool,* 14 Urban Education 303, 320 (1979).

Despite the widespread approval of magnet schools by the federal courts, critics maintain that magnet schools cannot correct the deep-seated evils of school desegregation. *See, e.g., Morgan v. Kerrigan,* 530 F.2d 401, 410 & n.10 (1st Cir.), *cert. denied,* 426 U.S. 935 (1976); *Bradley v. Milliken* 484 F.2d 215, 243 (6th Cir.), *rev'd on other grounds,* 418 U.S. 717 (1974); *Kelley v. Guinn,* 456 F.2d 100, 108-109 (9th Cir. 1972), *cert. denied,* 413 U.S. 919 (1973). Yet the criticisms in these cases generally apply to desegregation plans in which magnets are the principal tool in a "freedom of choice" plan. They function differently in the settlement agreement approved here by the district court. Magnet schools are a single element of the panoply of remedies approved by this Court and the district court. Like the magnet schools in *Stout v. Jefferson County Bd. of Educ., supra,* 483 F.2d at 86, they are "part of a complex and many-faceted" plan. Magnets perform the salutary function of allowing "non-white as well as the white students so enrolled a chance to widen their horizons through the interplay of ideas and the absorption of diverse sub-cultural attitudes." *Hart v. Community School Bd. of Educ., supra,* 512 F.2d at 54.

Magnet schools under this plan will be distinguished by the features that have made them successful in other cities: individualized teaching, a low pupil-teacher ratio, specialized programs tailored to students' interests, enriched resources and active recruitment. *See* Rosenbaum and Presser, *Voluntary Racial Integration in a Magnet School,* 86 U. Chi. School Rev. 156, 156 (1978); Levine and Eubanks, *Attracting Nonminority Students to Magnet Schools in Minority Neighborhoods,* 19 Integrateducation 52, 57 (1981). Because they are supplemented by the extensive program of interdistrict transfers and compensatory education, these magnets will not resegregate, nor will they create a dualistic system with elitist schools.

We do not believe that the district court erred in ordering the State to pay the full capital and operating cost of magnet schools. As we noted earlier, the State's status as a violator of

the Constitution compels the district court to remedy the deprivations the State has caused. In *Liddell V, supra,* 677 F.2d at 642, we held that the State could be ordered to undertake as a part of its remedial responsibility the development of magnets. Now we reaffirm that conclusion.

While we approve magnet schools and affirm the district court's decision concerning their funding, we see merit in the State's argument that careful study and planning must precede replication or expansion of magnets. New magnet schools must be approved by the Magnet Review Committee and the district court. The planning process should focus on those schools and programs that present a reasonable probability of attracting suburban white students; only those schools which demonstrate such a probability should be approved. The new schools should be phased in over a period of four years as provided for by the settlement agreement. The total number of students enrolled in city magnet schools shall not exceed 14,000.

We impose an additional limitation on the development of suburban magnets. Although a panel of this Court approved the use of suburban magnet schools in *Liddell III, supra,* 667 F.2d at 658-659; and *Liddell V, supra,* 677 F.2d at 641-642, the Court en banc does not believe that the record sufficiently supports this development. The county districts may proceed on their own, of course, without state funding. Any black city students who transfer into county-funded magnet schools would count toward achieving the district's plan goal and would contribute to the district's final judgment. State fiscal incentives would include payments to districts sending transferees to county-funded magnets, but the State will not be required to pay the capital or operating costs of county magnet schools as such.

B. PART-TIME INTEGRATIVE PROGRAMS.

Part-time integrative programs are primarily intended to provide integrative learning experiences for students attending all-black schools. *Adams v. United States, supra,* 620 F.2d at 1296; *Liddell IV, supra,* 693 F.2d at 727; *Liddell V, supra,* 677 F.2d at 642. These programs have been, and should continue to be, an important element of the overall plan to integrate the city schools. In determining the need for continuing the existing programs, or developing new ones, the City Board and the Budget Review Committee must keep the above standard in mind. They must also recognize that the number of black students in nonintegrated schools will decline dramatically over the next four years. We thus approve the district court's decision insofar as it permits the continuance of part-time integrative programs and requires the State to pay full cost of the approved programs.

We do not, however, specifically approve the new or expanded programs or the dollar amounts for these programs listed in the proposed budget (items A.4.10, A.4.11, A.5.01, A.5.02, A.5.04, A.5.05, A.6.01, A.6.03, and A.6.04). We rather require the City Board to resubmit to the Budget Review Committee, discussed *infra* Section VI, a list of the new or expanded programs that they would propose to implement. The total cost of these programs should not exceed $1 million. Further, these programs must not duplicate any programs approved in the quality education section of this opinion. Any dispute that emerges between the City Board and the State concerning these programs should be submitted for resolution by the Budget Review Committee and the district court in light of this discussion.

IV. QUALITY EDUCATION IMPROVEMENTS.

The settlement plan approved by the district court includes compensatory and remedial programs to improve the quality of education throughout the St. Louis public schools and additional programs for the same purpose in the nonintegrated schools. The district-wide improvements include a reduction in class size; restoration of art, music, physical education, and extracurricular programs; creation of pre-school centers and all-day kindergarten programs; additional staff to address the needs of handicapped students; additional nursing and counseling staff; and expansion of library and other media resources and services. Administrative improvements include curriculum and staff development, evaluation and performance assessment, and enhanced long-range planning.

The additional improvements for the nonintegrated schools include a further class-size reduction in grades K through 8, to twenty pupils per teacher; additional remedial instruction time through after-school, Saturday, and summer school programs; parental involvement programs; and alternative education options for black students unable to attend magnet schools. Other programs address motivational needs of students in the all-black schools by stimulating opportunities for student success and recognition, by introducing role models for academic achievement, and by establishing student concerns committees to address the morale, attendance, and behavior issues which emerge during the implementation of the plan.

A. LEGAL PRECEDENT FOR INCLUDING COMPENSATORY AND REMEDIAL PROGRAMS IN DESEGREGATION REMEDIES.

This Court suggested the necessity for remedial and compensatory programs in *Adams v. United States, supra,* 620 F.2d at 1296, and reiterated that need in *Liddell V, supra,* 677 F.2d at 641-642. We thus approve them in principle as law of the case. *See supra* p. 28. Moreover, such programs have solid support in the case law as proper components of a desegregation remedy so long as they relate to the constitutional violation, are remedial in nature, and account for state and local autonomy. *Milliken II, supra,* 433 U.S. at 280-281.

In *Brown I,* the Supreme Court recognized that segregation harms black children by generating "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown I, supra,* 347 U.S. at 494. In light of this harm, federal courts have often required the inclusion of remedial programs in desegregation plans to overcome the inequalities inherent in dual school systems. *Milliken II, supra,* 433 U.S. at 283. *See, e.g., Arthur v. Nyquist, supra,* 712 F.2d at 811; *Oliver v. Kalamazoo Bd. of Educ.,* 640 F.2d 782, 789-790 (6th Cir. 1980); *Evans v. Buchanan,* 582 F.2d 750, 767-769 (3d Cir. 1978) (en banc), *cert. denied,* 446 U.S. 923 (1980); *United States v. Texas,* 447 F.2d 441, 448 (1971); *United States v. Jefferson County Bd. of Educ.,* 380 F.2d 385, 394-395 (5th Cir.), *cert. denied,* 389 U.S. 840 (1967); *Berry v. School Dist. of Benton Harbor,* 515 F. Supp. 344, 369-373 (W.D. Mich. 1981), *aff'd and remanded,* 698 F.2d 813 (6th Cir. 1983); *United States v. Bd. of School Comm'rs of Indianapolis,* 506 F. Supp. 657, 671-673 (S.D. Ind. 1979), *vacated in part on other grounds,* 637 F.2d 1101 (7th Cir.), *cert. denied,* 449 U.S. 838 (1980).

Such programs "assist students who previously attended all-Negro schools when those students transfer to formerly all-white schools. . . . The remedial programs . . . are an integral

part of a program for compensatory education to be provided Negro students who have long been disadvantaged by the inequities and discrimination inherent in the dual school system." *Milliken II, supra,* 433 U.S. at 284 (emphasis in original), quoting *Plaquemines Parish School Bd. v. United States,* 415 F.2d 817, 831 (5th Cir. 1969). Crucial to the Supreme Court's analysis in *Milliken II* is the concept that segregation not only inflicts harm on individual black students, but also builds "inadequacies [into the] * * * educational *system.*" *Milliken II, supra,* 433 U.S. at 284 (emphasis added). Thus, to remedy the effects of a dual system which operated for decades with the sanction of law, remedial efforts must also concentrate on *Systemic* educational improvements.

A secondary remedial objective of the quality education improvements is to enhance the appeal of the city school system, thereby promoting the chances of a stable and successful voluntary desegregation plan. The exodus of white parents and students out of fear of integration, or "white flight," is no excuse for school officials to avoid desegregating. *United States v. Scotland Neck City Bd. of Educ.,* 407 U.S. 484, 491 (1972); *Monroe v. Bd. of Comm'rs,* 391 U.S. 450, 459 (1968). Yet, "there is a valid distinction between using the defense of white flight as a smokescreen to avoid integration," and addressing "the probability of white flight in attempting to formulate a *voluntary* plan which would improve the racial balance in the schools without at the same time losing the support and acceptance of the public." *Higgins v. Bd. of Educ.,* 508 F.2d 779, 794 (6th Cir. 1974) (emphasis in original); *accord Parent Ass'n of Andrew Jackson High School v. Ambach,* 598 F.2d 705, 719 (2d Cir. 1979). A child's enrollment in a particular school is the result of two decisions: the government's student assignment, and the parents' decision to stay, move, or send their children to private school. Thus, as Professor James Coleman insists, "government policies must, to be effective, anticipate parental decisions and obtain the parents' active cooperation." Coleman, *New Incentives for Desegregation,* 7 Human Rights 10,

13 (1978). Improving the quality of integrated schools consequently promotes parental acceptance of desegregation, and promotes the remedy's success. Gewirtz, *Remedies and Resistance,* 92 Yale L.J. 585, 652-653 (1983). *See also* Rossell & Hawley, *Policy Alternatives for Minimizing White Flight,* 4 Educational Evaluation and Policy Analysis 205 (1982).

The quality improvements for the all-black schools serve a further remedial objective. A strong presumption exists against the constitutional propriety of one-race schools, *Swann v. Charlotte Mecklenburg Bd. of Educ., supra,* 402 U.S. at 26, and any desegregation plan leaving one-race schools must be carefully scrutinized. *Id.; Lee v. Macon County Bd. of Educ.,* 616 F.2d 805, 809 (5th Cir. 1980). To overcome this presumption of unconstitutionality, a court must find that the existence of one-race schools is justified in light of the particular facts of the case and the feasibility of other desegregation techniques. *Armstrong v. Bd. of School Directors,* 616 F.2d 305, 321-322 (7th Cir. 1980); *Tasby v. Estes,* 572 F.2d 1010, 1014-1015 (5th Cir. 1978). When no other feasible desegregation techniques exist, then specific remedial programs for students in the remaining one-race schools may be included as a means of ensuring equal educational opportunity. *See, e.g., Tasby v. Wright, supra,* 713 F.2d at 95-97; *Clark v. Bd. of Educ. of Little Rock, supra,* 705 F.2d at 272.[15]

The district court held extensive hearings on the fairness of the quality education component, with lengthy testimony from local and State education officials, a number of expert witnesses, and representatives of the other parties. After reviewing the evidence and the recommendations of the court-

---

[15] The quality of an all-black school is also improved when students attend such schools voluntarily. *See* Coleman, *New Incentives for Desegregation,* 7 Human Rights 10, 14-15 (1978). The settlement plan recognizes this imperative in providing for voluntary interdistrict transfers.

appointed financial advisor, the court concluded that the programs fell within the proper remedial scope:

> The sole purpose for the expenditure of funds under this Plan is to carry out the constitutional responsibility to remove the vestiges of a segregated school system. * * *
>
> In no way should any funding provisions presently authorized by the Court be construed to authorize expenditures unrelated to City Board's desegregation obligations under the constitution and the Settlement Plan as approved.

Liddell v. Bd. of Educ., supra, 567 F.Supp. at 1051-1052.

B. ANALYSIS OF THE COMPENSATORY AND REMEDIAL PROGRAMS APPROVED BY THE DISTRICT COURT.

The position of the State before this Court with respect to the quality education programs is somewhat ambiguous. In its opening brief, it argued that the city and county schools had not agreed to a quality education package and that therefore the district court had nothing to approve.[16] It further asserted that

> [t]he Quality Education [component] is not only essential from a contractual point of view but also from a constitutional standing. The 15,000 black children in north St. Louis who will not have the opportunity to transfer under the Plan are still victims of constitutional wrongdoing as found by the court. The Quality Education section of the

---

[16] Section IV of the settlement plan states:

> [T]he St. Louis County School districts do not have the necessary information about the city schools to form an opinion on the details of the Appendix and, therefore, they do not agree or disagree with all of the specifics in this basic design.

> Plan is virtually the only remedy available to those black children to redress their wrong. Without it they stand as victims without redress.

State's Opening Brief at 26-27.

It concluded by stating that the court did not have the authority to modify the agreement to include the quality education component.

In its reply brief, the State changed the focus of its argument and complained that the provisions requiring improvement in the quality of education in the integrated schools were only remotely related to desegregation. It continued to assert this position at oral argument.

The State is not a party to the settlement agreement. It thus lacks standing to question the validity of the agreement on its terms. *Warth v. Seldin,* 422 U.S. 490, 501 (1975); *Fisher v. Tucson School District No. 1,* 625 F.2d 834, 837 (9th Cir. 1980). Even assuming that the State has standing to raise such a question, the district ocurt found that the parties had a meeting of the minds with respect to the essential terms of the agreement. This finding is not clearly erroneous.

The State clearly has standing, however, to challenge the district court's funding order and did so before that court. It renews that challenge here. It argues, in substance, that the court approved funding for general educational improvements in the integrated schools which were unrelated to

desegregation.[17] Its argument here is twofold. First, the State contends that these programs may only be approved if the Court can find that they would have been a part of the city school system *but for* the past unconstitutional segregation. This position misreads the case law and ignores the reality of the harm imposed by segregated schools. The relevant inquiry is not whether, in absence of a *de jure* dual system, St. Louis schools would have had compensatory and remedial programs. None of the numerous cases cited above approving such programs rested on such a conclusion. The point is that compensatory and remedial education programs are necessary to remedy the effects of discrimination on the victims of segregation and the school system itself.

The second aspect of the State's argument is that there are no findings made by the district court, nor sufficient support in the record, to suggest that the quality education improvements are

---

[17] The State cites *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973), as support for the position that St. Louis students have no constitutional right to any particular level of education, but fails to note a critical distinction between *Rodriguez* and this case. *Rodriguez* held that property wealth is not a suspect class under the equal protection clause, and thus disparate educational expenditure levels between school districts were not a constitutional violation. Hence, the *Rodriguez* plaintiffs had no constitutional right to a particular level of education. *Id.*

Our case unquestionably involves a suspect class (race), and an established constitutional violation (a *de jure* dual school system). As noted above, courts have repeatedly endorsed compensatory and remedial efforts to overcome educational inadequacies imposed by segregated schools, *Rodriguez* notwithstanding.

only *remedial* in nature.[18] The Second Circuit recently observed that the line between remedial purpose and general educational improvements unrelated to desegregation is inevitably blurred:

> [A] court is entitled to require money for programs that materially aid the success of the overall desegregation effort. A program of that sort is not disqualified for needed funding simply because its inclusion improves the overall quality of the school system. At the same time a court must be alert not to permit a school board to use a court's broad power to remedy constitutional violations as a means of upgrading an educational system in ways only remotely related to desegregation. Striking the balance necessarily requires considerable deference by a district court to the good faith representations of the school authorities * * * and by a reviewing court to the knowledgeable assessment of a district judge intimately familiar with local conditions.

Arthur v. Nyquist, supra, 712 F.2d at 813 (citations omitted).

We think that the district court's order is fully supported as it relates to the quality improvements in the nonintegrated schools. Neither the State, the United States, nor the City specifically objects to these improvements. Moreover, they are consistent with the testimony of every expert witness that testified. The reduction in class-size was viewed by the witnesses for the black plaintiffs as critical to raising the achievement levels of black students. The programs designed to intensify remedial instruction, encourage parental involvement, and promote a positive learning climate reflect the objectives that the

---

[18] To clarify, relating the remedy to the violation pursuant to *Milliken II* does not require a finding that *each* educational program at issue has in the past been "infected with the discriminatory bias of a segregated school system." *Evans v. Buchanan, supra,* 582 F.2d at 769, quoting *Milliken II, supra,* 433 U.S. at 275. It is sufficient to determine that the remedial program is directed to cure the general condition offending the Constitution.

Supreme Court approved in *Milliken II*. *See Bradley v. Milliken*, 402 F. Supp. 1096, 1118-1119 (E.D. Mich. 1975), *aff'd and remanded*, 540 F.2d 229 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977). The schools of emphasis assist in providing equal educational opportunity by providing alternative education options for black students unable to attend magnet schools. The motivational programs are designed to bring about productive attitudes towards learning, and are essential in the opinion of expert witnesses called by the black plaintiffs. *See* Haywood, *Compensatory Education*, 59 Peabody J. of Educ. 272, 274 (1982). Crain & Mahard, *How Desegregation Orders May Improve Minority Academic Achievement*, 16 Harv. C.R.-C.L. L. Rev. 693, 702 (1982).

Notwithstanding our affirmance in principle of the district court's order insofar as it relates to the all-black schools, we believe that the following modifications to the order should be made so that careful planning and effective implementation may proceed without disruption of the current school year:

> (1) To the extent that any of the programs have been heretofore instituted, they may be continued. The remaining programs may be instituted at the beginning of the 1984-85 school year. The summer school program may be implemented for the summer of 1984.
>
> (2) The reduction in class size from present levels to the 20:1 pupil-teacher ratio should be made over a period of four years beginning in 1984-85. The phased reduction recognizes that as many as 12,500 additional black students may transfer to county schools in the next four years, and that as many as 3,000 more black students may transfer to magnet schools during the same period. By coordinating the class-size reduction with the transfers, student and teacher disruption can be lessened and the construction or rehabilitation of school buildings to house the smaller classes minimized.

(3) The amount budgeted for item B.1.01, Coordination of Instruction, should be reduced by one-half. Evelyn F. Luckey, an expert witness for the Liddell plaintiffs, testified that the program could be successfully accomplished within the limits of the reduced amount.

(4) The schools of emphasis should be phased in over a two-year period beginning in 1984-85.

(5) Detailed planning for the programs in the all-black schools should continue so that the programs can be implemented on schedule.

We cannot fully agree with the district court's conclusion that all of the quality education improvements in all schools are closely related to the integration process. While we concur with the Second Circuit's view that a district court should show considerable deference to the good faith representations of the school authorities, and that we should show similar deference to the judgment of the district court, a review of the record leaves us with the firm conviction that the district court erred in approving many of the programs in the quality education budget.

We begin our analysis by indicating our areas of agreement with the district court. Initially, we believe there is strong support in the record for approving those programs necessary to permit the city schools to regain, and then retain, their Class AAA status. This standard is developed by the Department of Education of the State of Missouri. *See* Handbook for Classification and Accreditation of Public School Districts in Missouri (1980). Seventy-four percent of the children attending Missouri public schools attend schools that have this rating. Missouri School Directory (1982-83). The City Board was denied this rating because its classes were too large, it had too many uncertified teachers, it lacked counselors in the elementary grades, it did not provide art, music, and physical educa-

tion in the elementary grades, and its library and media services were inadequate.[19]

Second, we find adequate support in the record for preschool centers (budget item A.4.01, $811,000), and for planning and program development (a part of budget item A.1.01, $585,000). Both of these programs are recommended by the State Department of Education, and both have been shown to be closely related to the desegregation process.

Third, we find adequate support in the record for all-day kindergartens (budget item A.4.02, $6,129,000); parental involvement (budget item A.8.05); desegregation planning (budget item A.8.13, $41,000); long-range planning (budget item A.8.15, $431,000); and public affairs (budget item A.8.06, $184,000). The all-day kindergarten program serves several important compensatory and remedial objectives. Much of the testimony at the fairness hearings emphasized the importance of focusing desegregation efforts on the earlier grades, as younger children have developed fewer racial prejudices and differences in performance are narrower. *See* Hawley, *Effective Educational Strategies for Desegregated Schools,* 59 Peabody J. of Educ. 209, 214 (1982). The additional instruction time will also assist in building prerequisite skills for city pupils. The testimony also emphasized that many of the children came from single-parent families that did not provide them with the skills which would permit them to compete with other children at the first-grade level. *See Milliken II, supra,* 433 U.S. at 284. The all-day kindergarten program is an expensive one which must be implemented carefully if waste is to be avoided, and the full benefits of the program realized. We therefore direct that the program be phased in over a period of at least two years.

---

[19] Since this Court's order of September 12, 1983, many of the changes necessary to gain a AAA rating have been implemented and the State has recently restored the AAA status to the city schools.

Parental involvement is similarly emphasized, both in the record and in the literature, as crucial to the success of the desegregation plan. *See, e.g.*, Hawley, *Effective Educational Strategies for Desegregated Schools, supra,* at 212, 225-226. Because many students will not be attending their neighborhood schools as a result of the student transfers, special parent-staff seminars and other programs will be critical in developing and maintaining parental involvement. The changes involved in implementing the plan, and the future demographic and student enrollment shifts, render long-range planning essential to the successful desegregation of the city schools. The public affairs program is essential to citizen awareness and acceptance of the plan.

In light of the foregoing discussion, we approve the district court's funding order insofar as it relates to programs necessary to the city schools to retain its AAA rating. While the record is not entirely clear as to precisely what programs the State required the City Board to institute to regain this rating, it appears that they are budget items A.2.01, library and media services; A.2.02, audio visual services; A.3.01, lower class size; and A.3.02, restoration of art, music, and physical education. It is the intention of the Court that these budget items be implemented only insofar as necessary for the city schools to retain their AAA status. Retaining this status does not include a further class-size reduction in the integrated schools. We also approve the following additional programs: preschool centers, planning and program development, all-day kindergarten, parental involvement, desegregation planning, long-range planning, and public affairs.

We cannot, however, find adequate support in the record for the remaining programs. All are desirable, but the City Board has not made the case that they are necessary to provide equal educational opportunities to the children of St. Louis, or are otherwise essential as remedial or compensatory programs.

C. CAPITAL IMPROVEMENTS IN THE INTEGRATED AND NONINTEGRATED SCHOOLS

The settlement agreement describes the age and condition of the city schools: Generally, they are in a condition of old age, rapid deterioration, and extreme deferred maintenance. Thirty-four of the nonintegrated black schools and twenty-one of the integrated schools are over fifty years old. Nearly one-fourth of the building area in the city schools is over seventy-five years old. Nearly one-half of the building area in the city schools is over sixty-five years old. More than two-thirds of the building area in the city schools is over fifty years old. At the fairness hearing, the district court heard uncontradicted evidence as to the condition of the city school facilities which paralleled that recited in the settlement agreement.

In the last twenty-four years, St. Louis voters have defeated thirteen proposed bond issues. The only bond issue to pass during this period was in 1962, and approval came only after resubmission to the voters. Significantiy, both of the last two proposed bond issues were approved by a simple majority; the constitutional requirement of two-thirds voter approval, however, blocked passage of these issues.

At the fairness hearing, the State argued that more careful planning was required before renovation or new construction programs could be initiated, particularly in light of expected declining enrollment in the city schools. It also argued that the schools were in a deplorable condition because the City School Board had failed to maintain them over the years. It questioned whether certain items were properly included in the capital improvement budget, contending that they were routine maintenance items that should be funded exclusively by the City Board.

The district court's order and memorandum did not discuss the facility improvement program at length. It simply stated that

(b) the City Board shall submit to its voters, on or before February 1, 1984, a proposed bond issue of an amount determined by the City Board as sufficient to meet those of its capital improvement needs as are deemed necessary to meet its constitutional obligation to desegregate the City's public schools; [and]

(c) should that bond issue fail to obtain the two-thirds majority vote required by State law, the Court will consider an appropriate order to obtain the funds deemed sufficient to meet the capital improvement needs of City Board in complying with its constitutional obligation to desegregate the City's public schools.

Liddell v. Bd. of Educ., supra, 567 F. Supp. at 1056.

Pursuant to that order, the City Board formulated a building program with a total cost of $127 million, with one-half of the total to be financed by the issuance of $63.5 million in City Board bonds.

The bond issue was presented to the voters on November 8, 1983, and fifty-five percent of the voters approved the issue. Eighty-four percent of the voters in the predominately black wards voted for the issue, but sixty-five percent of the voters in the predominately white wards voted against it. The bond issue was defeated because it failed to receive a two-thirds majority.

On appeal to this Court, the State does not question either the need to improve facilities, nor its obligation to help pay for these improvements. In its opening brief, it argues that if the bond issue fails, the whole plan will fail for lack of funding because it is unfair to expect the State to pay the full costs of the improvements. It also renews its argument that, because the county schools failed to agree to a detailed building program, the settlement agreement as a whole must fail. Finally, it asserts that, in any event, the district court is without authority to enter an order requiring a tax levy to fund the City Board's share of

the improvements. In its reply brief, the State simply states that the provision of the order requiring "extensive capital improvements" is "entirely out of proportion to the constitutional violations found by the District Court."

The district court did not err in holding that the State had an obligation to pay one-half of the costs of the capital improvement program necessary to restore the city facilities to a constitutionally acceptable level, and we find no merit in the State's suggestion that the district court's order cannot stand because the county districts failed to agree to the details of the facilities improvement program. *See supra* pp. 49-50.

There is merit to the State's argument that more careful and detailed planning should precede action by the district court and that this planning should identify the projects to be undertaken, establish the cost of each project and set a more specific schedule for the improvements. Planning and scheduling are particularly important in view of the expected decline in enrollment.

On remand, therefore, the City Board should promptly identify the projects to be undertaken, estimate the cost of each project, and set a reasonably detailed schedule for the completion of each project. The projects having the highest priority must be scheduled for completion at the earliest possible date. To that end, the City Board should consider the desirability of a referendum on a bond issue which can be initiated at a very early date and a subsequent bond issue for those projects to be built in later years. The State will pay one-half of the cost of preparing the detailed plans and schedules.

As soon as the City Board has prepared the new plans, estimates, and schedules, it shall submit them to the Budget Review Committee, discussed *infra* Section VI, and then to the district court. When the district court has approved them, a new bond issue shall be submitted to the voters. If it is defeated again, the district court shall determine how the improvements will be funded. *See infra* Section V.

V. FINANCING DESEGREGATION IN ST. LOUIS CITY SCHOOLS.

In November, 1982, Missouri voters approved a referendum (Proposition C) which directed local school officials to reduce their operating levies by an amount equal to fifty percent of the revenues local school districts would receive under a one-cent increase in the state sales tax. Mo. Rev. Stat. § 164.013 (Supp. 1983). In its July 5, 1983, order, the district court enjoined this rollback of local real estate taxes, *Liddell v. Bd. of Educ., supra,* 567 F. Supp. at 1056, and directed the Board of Education to use this money to fund the quality education programs necessary to restore the St. Louis schools to their AAA status. In our en banc order of September, 1983, we sustained the district court's injunction of the rollback on equitable grounds, for the injunction was already in place, and reversal at that time would have seriously disrupted St. Louis's system of school finance. *Liddell VI, supra,* 717 F.2d at 1182-1184. We sustain the injunction against the rollback for the balance of this school year for the same reason. The equitable nature of that decision obliges us now to examine the propriety and the merits of the district court's injunction of the rollback with respect to years beyond 1983-84. We also consider the district court's authority to order a further increase in property taxes to fund operating expenses or capital improvements.

We hold that the district court's broad equitable powers to remedy the evils of segregation include a narrowly defined power to order increases in local tax levies on real estate. Limitations on this power require that it be exercised only after exploration of every other fiscal alternative.

The district court's use of broad equitable powers concerning school desegregation costs has been approved by previous opinions of the Supreme Court. Thus, it has declared that, when predicated on a right and a violation, "the scope of a district court's equitable powers to remedy past wrongs is broad, for

breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ., supra,* 402 U.S. at 15. These powers subsume a broad range of ideas and tactics: equity assures that "all reasonable methods be available to formulate an effective remedy." *North Carolina State Bd. of Educ. v. Swann,* 402 U.S. 43, 56 (1971). These powers may also be applied broadly "to achieve the greatest possible degree of [relief] taking into account the practicalities of the situation." *Davis v. Bd. of School Comm'rs of Mobile County,* 402 U.S. 33, 37 (1971).

In *Griffin v. School Bd. of Prince Edward County,* 377 U.S. 218 (1964), the Supreme Court acknowledged that the district court may order an increase in taxes to fund schools where the State has defaulted on its obligation to provide an equal educational opportunity to all students. The Court did not limit the scope of its holding by ordering a return to the previous tax levy or procedures. It indicated only that the tax must be "necessary to prevent further racial discrimination" and that it must "raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system." *Id.* at 233.

In *United States v. Missouri,* 515 F.2d 1365 (8th Cir.), *cert. denied,* 423 U.S. 951 (1975), this Court also acknowledged the district court's remedial power to require a tax levy in excess of that authorized by the voters. When the district court ordered the consolidation of three St. Louis suburban school districts with disparate tax rates ($3.80, $4.97 and $5.38), it concluded that a uniform tax rate higher than any of the three ($6.03) would be necessary "to effectively operate the desegregated district," *id.* at 1371, and that "[t]his rate, inclusive of the amount necessary to service the total debt of the enlarged district, shall be deemed to have been approved by the voters for the purposes of Article 10, section 11(c), Missouri Constitution." *Id.* at 1372. In setting that rate, the district court also noted that "there was no reasonable possibility that such a tax levy would be approved by the required two-thirds vote in the aftermath of the desegregation order." *Id.* at 1371-1372.

On appeal, this Court sitting en banc unanimously approved a rate of $5.38, the highest rate of the three districts. Judge Stephenson, writing for the full Court, stated:

> It is anomalous to suggest that the district court has the power to disestablish a dual school system but does not have the power to fashion an appropriate remedy. In *North Carolina State Board of Education v. Swann,* 402 U.S. 43, 45 * * *, the court stated:
>
> > [I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees.
>
> We have likewise held in ordering implementation of a school integration plan that "the remedial power of the federal courts under the Fourteenth Amendment is not limited by state law." *Haney v. County Board of Education of Sevier County, supra,* 429 F.2d at 368 * * *.
>
> We are satisfied that the district court had the authority to implement its desegregation order by directing that provision be made for the levying of taxes essential to the operation of the new school district. It is our view, however, that deference should be given to the plan submitted in good faith by the state and county officials and which was largely accepted by the court. It was the view of the state that with the receipt of anticipated funds through action of the legislature the present Ferguson rate would be adequate. Maximum consideration should be given the views of the state and local officials concerned so long as they appear compatible with the goals to be achieved. The maximum rate in the new district should be reduced to $5.38 per hundred.

Id. at 1372-1373 (citations and footnote omitted).

The City cites *Evans v. Buchanan,* 582 F.2d 750 (3d Cir. 1978) (en banc), for the proposition that the district court is without authority to order a tax increase to fund a court-imposed desegregation plan. The decision cannot be so construed. Indeed, the court en banc, relying on *Griffin,* made clear that the district court had that authority: had the State allocated "no funds, or substantially insufficient funds, to operate the remainder of the school system, such action by the State would clearly be unacceptable as interfering with the operations of the desegregation decree." *Id.* at 780. In addition, in *Evans,* the district court had acted before the "obvious inherent political safeguards * * * [were] permitted to run their course." *Id.* Our instructions on remand are entirely consistent with *Evans* because the district court must defer to the political funding process before it may consider ordering a tax increase. We read *Evans* for the proposition we stated at the outset of this discussion: a district court may require an increased tax levy, but only where necessary to remedy a violation of the Constitution, and only after exhausting all other alternatives.

The City and State also cite *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973), in arguing that the courts should defer to the legislative expertise of state and local governments. That case is also distinguishable. It involved an equal protection challenge of Texas's use of the property tax for funding education. The appellants claimed that this system of taxes *per se* was discriminatory because it raised disparate revenues in different school districts acording to disparities in the assessed valuation of property within the districts. The Supreme Court found no suspect class affected and no fundamental rights at stake. Instead, it relied on the "rational basis" test and deferred to legislative expertise in fiscal matters. On the other hand, in this case, the City Board and State have both been adjudged constitutional violators in matters involving a suspect classification. Moreover, in this case, no one

challenges the mechanics of the tax system, which was the central issue in the passage from *Rodriguez* that the State cited.[20]

Our conviction that the district court's equitable power includes the remedial power to order tax increases or the issuance of bonds finds support in the case law surrounding the contracts clause of the United States Constitution. U.S. Const. art. 1, § 10, cl. 1. The Supreme Court has recognized that a municipality's contractual obligations cannot be impaired solely because state law restricts its powers to tax in order to meet those obligations. When the City of New Orleans raised such an argument in an attempt to avoid its debts owed to the receiver of a metropolitan police board, the Court had no trouble holding that the courts could require "the city to pay over the taxes for which the judgment was rendered, or to levy and collect a tax therefor for the benefit of the relator as receiver." *Louisiana ex rel. Hubert v. Mayor and Council of New Orleans,* 215 U.S. 170, 181 (1909). *See also Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 103 S. Ct. 697, 705 n.14 (1983) ("When a

---

[20] The State relies on several older cases to argue that the district court may not order a tax levy to satisfy a judgment against a municipality. Each of these cases arose in a commercial context. In *United States v. County Court of Clark County,* 95 U.S. (5 Otto) 769 (1878), a bondholder sought a court-ordered tax levy to pay interest coupons for years preceding the year the bonds were issued. The Court declined to levy taxes because until the bonds were issued, the county had no obligation and no authority to levy the taxes. *Rees v. City of Watertown,* 86 U.S. (19 Wall.) 107 (1874), and *United States v. County Court of Macon County,* 99 U.S. 582 (1879), involved bondholders requesting court-ordered levies to pay for bond defaults. In both cases, the Court declined, holding the remedy barred by statutes in existence at the time the contracts of indebtedness were formed. Since the statutes became, by implication, a part of the contract, they precluded the use of the taxing remedy. Finally, in *Citizens' Savings and Loan Ass'n v. Topeka,* 87 U.S. (20 Wall.) 655 (1875), the Court delined to order a tax levy to pay for a default on bonds isued by a local corporation aided by the city. The Court reasoned that the tax would not have been lawful because it would not have been levied for a public purpose.

State itself enters into a contract, it cannot simply walk away from its financial obligations."); *United States Trust Co. v. New Jersey,* 431 U.S. 1, 24 (1977) ("[T]he taxing power may have to be exercised if debts are to be repaid. Notwithstanding these effects, the Court has regularly held that the States are bound by their debt contracts." [Footnote omitted.]).

Similarly, courts have recognized that municipalities may not avoid their liability in tort by pleading constitutional or statutory debt limitations. *Wichita Finance and Thrift Co. v. Lawton,* 131 F. Supp. 788, 790 (W.D. Okla. 1955); *State ex rel. Martin v. Harris,* 75 N.M. 335, 115 P.2d 80, 83 (1941); *Raynor v. King County,* 97 P.2d 696, 708 (Wash. 1940); *City of Catlettsburg v. Davis' Administration,* 262 Ky. 726, 91 S.W.2d 56, 59-60 (1936); *Town of Flagstaff v. Gomez,* 242 P. 1003, 1004 (Ariz. 1926); *City of Long Beach v. Lisenby,* 179 P. 198, 200 (Cal. 1919) (taxes in such cases can be raised beyond their legal limits by the courts "without a vote of the people of said city.").

We turn to an evaluation of the district court's July 5, 1983, order in light of the foregoing discussion. We initially note that the district court declined to order an increase in real estate levies for operating purposes until the need for such revenues had been clearly demonstrated. It also declined to order a tax increase to fund capital improvements until such time as a bond issue of an amount determined by the City Board as sufficient to meet the most pressing capital improvement needs of the Board's constitutional obligation to desegregate had been submitted to the voters. It acted properly in both respects.

It went on, however, to authorize and direct the City Board to not reduce its operating levy as required by Mo. Rev. Stat. § 164.013 (Proposition C), and to direct the State to refrain from withholding from the City Board funds that it would otherwise withhold pursuant to the same statute. It required that the revenue realized be utilized to fund the desegregation plan. It

stated that any revenue thus retained but not necessary to fund the City Board's constitutional obligation should be applied to reduce its operating levy on July 1, 1984.

In our view, this order was deficient in that it was not accompanied by a factual finding by the district court that all other fiscal alternatives were unavailable or insufficient. We are unwilling to read such a finding into the record even though the record reveals that the City Board has little or no budget surplus, federal aid for desegregation has been cut, real estate values in the district have risen only slightly in recent years and referenda to secure additional funds have been largely unsuccessful.[21] On remand, the district court must allow the rollback under Proposition C to take effect for the 1984-85 school year unless it finds that no other alternatives are available or sufficient to finance its desegregation order. In addition, it shall not require any additional levy unless it makes similar findings.

Specifically, the district court should, first, promptly determine the amount of money that will be required in 1984-85 to fund the desegregation order and it should subsequently determine the funds necessary for each of the succeeding years. Second, the district court should determine whether the City Board is able, with its own resources, to fund its share of the costs. In making this determination, the district court shall consider the reduced budgetary pressures that will result from the transfer of nearly 6,000 students from city to county schools in 1984-85, and from the transfer of an additional 9,000 students in the following three years. In addition, the district court shall con-

---

[21] Since 1970, five referenda have been submitted to the voters to increase the authorized operating levy. While one requested increase passed in 1976, the remainder failed even though three of these remaining four received a majority vote. We note, however, that an increase of $.25 per $100 of assessed valuation in the current operating levy could be approved by a simple majority of the voters. Mo. Const. art. 10, § 11(c).

sider the effects of students transferring to magnet schools and of the City Board's receipt of transfer payments under the settlement agreement for sending students to county schools. Third, if the district court determines that the City Board lacks resources sufficient to fund its share of the desegregation order, it shall consider alternative sources of revenue. These alternatives include, but are not limited to: submission of a referendum to the voters for an increased operating levy; or authorization of the City Board by the State legislature to impose non-real estate taxes within the city. Fourth, if the voters refuse to approve a higher tax levy, or if the legislature fails to authorize the City Board to raise taxes from non-property tax sources, or if the City Board and the State, as joint tortfeasors, are unable to agree on an alternate method of raising the City Board's share of the cost, the district court shall conduct an evidentiary hearing and thereafter enter a judgment sufficient to cure the constitutional violations which we have found in a manner consistent with this and prior opinions.

VI. BUDGET REVIEW COMMITTEE.

The settlement agreement, the district court's funding order and opinion, and this Court's opinion have established detailed guidelines for desegregating the city schools over the next four years. The agreement provides for a number of committees to assist in desegregation. They include the Desegregation Monitoring and Advisory Committee, the Magnet Review Committee, and the Voluntary Interdistrict Coordinating Council. The function of the latter committee is to coordinate and administer the student transfers, the voluntary teacher exchanges and the part-time educational programs. A Recruitment and Counseling Center has also been established. Each of these committees and the Center fulfill important functions in the desegregation process and may be continued and funded in accordance with the settlement agreement at the discretion of the district court.

The district court also outlined the budgeting procedures that would be followed:

> 11. For the effective and timely implementation of the Settlement Plan, as approved, the following budgeting procedure shall apply with regard to all actual and reasonable costs, except transportation costs and costs incurred for the student transfer payments made to sending and receiving districts, incurred pursuant to the approved Plan:
>
> (a) each participating school district shall deliver to State defendants a proposed budget for all desegregation programs and activities intended for implementation pursuant to the Settlement Plan[.] * * * For * * * fiscal [year 1984-85 and subsequent years], the budgets shall be delivered to the State on or before March 1 of the preceding fiscal year;
>
> (b) the budget for the VICC and for the Recruitment and Counseling Center (RCC) shall be filed with the Court and submitted to the State on or before * * * March 1 of the preceding fiscal year;
>
> (c) on or before [March 15 of each preceding fiscal year], representatives of the State and of each participating district shall identify in writing their areas of agreement and disagreement relating to budgetary matters. * * * After completion of these efforts, the representatives may submit to the Court a joint statement of budgetary matters then remaining in dispute for the Court's consideration.
>
> [T]he State shall submit in writing any objections to the budgets for the VICC and for the RCC * * * on or before March 15 of the preceding fiscal year. After completion of these efforts, the representatives may submit to the Court a joint statement of budgetary matters then remaining in dispute for the Court's consideration;

(d) the Court's financial adviser may participate in the budget meetings between the State and the various representatives, and may present comments on the budgets to the Court either in writing directly, or at any subsequent hearing that may be required; and

(e) for the 1983-1984 fiscal year, any budget disagreements that remain, after the required meetings and reports, will be referred to United States Magistrate David D. Noce for a hearing on or before August 5, 1983. For subsequent fiscal years, the Court will consider any remaining disputed budget issues in a manner the Court deems appropriate.

Liddell v. Bd. of Educ., supra, 567 F. Supp. at 1057.

We believe that the budgeting process is deficient in three respects: (1) it fails to require long-range budgeting; (2) it does not give the State, the principal funding source for the plan, an adequate role in the budgetary process; and (3) it fails to provide an effective method of resolving budgetary disputes before they reach the district court. As a result, that court must spend an inordinate amount of its time resolving disputes that should be resolved by the parties.

We direct that a small budget committee be named, consisting of two representatives of the State of Missouri, one representative from the city schools to be selected by the City Board, one representative to be jointly selected by the Liddell and Caldwell plaintiffs, and a court-appointed expert in school financing at the earliest possible date. The court-appointed expert shall serve as chairman of the committee. Its responsibilities will be determined by the district court but will include:

(1) Preparing, with the cooperation from the participating school districts, a budget for the 1984-85 school year through the 1987-88 school year for each element of the desegregation plan (including capital requirements and updating that budget

on an annual basis). These budgets should reflect the best current estimates that can be made of the probable cost of the plan for each of the next four years. The budgets will permit the State and the City Board to anticipate the funds that will be required to fund the plan. They will also force the participants to consider at an early date the dramatic changes that will occur in the city schools' student population in the integrated and nonintegrated schools and magnet schools, and will assist in the effort to control costs.

(2) Receiving the annual budgets prepared by the participating school districts on the same date that the budgets are to be received by the State. The State and each participating district will identify, in writing, their areas of agreement and disagreement relating to budgetary matters at a time to be determined by the court on the recommendation of the Budget Committee. The Budget Committee will make every effort to resolve differences as to the budget in accordance with the principles set forth in the settlement agreement, the district court's order and this opinion. Any unresolved disputes will be promptly presented to the district court with the recommendations of the court-appointed expert. The district court will resolve any disputes. This resolution is not an appropriate task for a United States Magistrate. The number of disputes should be dramatically reduced if the parties participate in good faith in the procedure outlined. The district court will enter an appropriate order with respect to the funding of the Budget committee.

VII. OTHER ISSUES.

Several issues raised by various parties remain for resolution by this Court. We hold the following:

A. ST. LOUIS TEACHERS.

This district court did not err in denying the St. Louis Teachers Union Local 420 the right to intervene in these proceedings. The Union has, however, timely raised its interest in seeking preferential hiring rights for black city teachers in county school districts, and this interest is sufficient to allow its intervention in future proceedings. *See* Fed. R. Civ. P. 24.

We note further that the settlement plan contains annual hiring goals for black teachers and administrators in the county schools. Implementation of these goals requires only nominal monetary support from the State, and provides significant benefits to the county districts and the black plaintiffs. We approve this section of the settlement plan.

B. NORTH ST. LOUIS PARENTS

The North St. Louis Parents and Citizens for Quality Education argue that the district court erred in approving the settlement plan because it sacrifices the interests of the black students who will remain in the all-black schools for the interests of the black students who will transfer to county schools. They base their argument on the fact that the amount of state funding for students who opt to bus to county schools greatly exceeds the amount of state funding to compensate students who remain in neighborhood all-black schools.

As we have discussed, *supra* p. 47, equal educational opportunity for students remaining in one-race schools is a crucial concern in examining a desegregation remedy. The settlement plan contains significant quality improvements for the all-black schools, and we have approved these programs with minimal limitations. We find no evidence in the record to support the claim that the interests of students attending the all-black schools are being slighted. As we see the record, black students will now have several alternatives: attend their neighborhood school, attend an integrated school in the city or county, or attend a magnet school.

Both the North St. Louis Parents and the City argue that the district court failed to provide adequate notice to potential class members. We hold that the district court did not err in this regard. Nor did it deprive the North St. Louis Parents as class members of due process by failing to respond in detail to their objections to the settlement plan. The district court's opinion reveals that it engaged in a reasoned examination of objections raised by class members concerning whether the plan is fair, reasonable and adequate. *Liddell v. Bd. of Educ., supra,* 567 F. Supp. at 1042-1047.

C. THE CITY'S PETITION FOR A WRIT OF PROHIBITION, AND ITS OTHER REMAINING OBJECTIONS.

In our recent en banc order, we reserved a ruling on the City's petition for a writ of prohibition until we considered the merits on appeal. *Liddell VI, supra,* 717 F.2d at 1184. For the reasons discussed above, *supra* pp. 59-66, concerning the City Board's property tax rate, we deny the writ.

For reasons discussed throughout this opinion, we hold that the district court did not fail to evaluate the settlement ageement properly; we thus dismiss the City's objections on this point. The City argues further that the district court erred in denying or limiting cross-examination of experts at the fairness hearing. We find no abuse of discretion by the district court in this regard. *See* Fed. R. Evid. 611.

D. FINAL JUDGMENT FOR THE COUNTY SCHOOL DISTRICTS.

We specifically approve the settlement agreement insofar as it relieves the participating county school districts of liability if they meet the goals set forth in the settlement plan within five years.

We have considered all other arguments and find they have no merit.

CONCLUSION

The judgment of the district court is affirmed in part and reversed in part, and this matter is remanded to the district court for action consistent with this opinion. The City Board, the City of St. Louis, the North St. Louis Parents and Citizens for Quality Education, and the St. Louis Teachers Union Local 420 will each bear their own costs on appeal. All other costs of appeal shall be taxed to the State of Missouri. The mandate of this Court will issue forthwith.

JOHN R. GIBSON, Circuit Judge, concurring in part and dissenting in part.

The Court today approves a settlement which in great part requires funding by the State of Missouri. The State of Missouri was not a party to this settlement. In the litigation before us the State has been found to be a constitutional violator insofar as there is a intradistrict constitutional violation within the City of St. Louis. The Court today improperly requires the State to fund a remedy far broader than this constitutional violation, an admittedly interdistrict remedy involving not only the schools in the City of St. Louis but the schools in St. Louis County. Accordingly, I must dissent in part.

It is necessary that we first determine what this Court has found to be the constitutional violations by the State of Missouri and then consider the nature of the remedy that may be employed in such circumstances.

I.

Even though this case has been before this Court on four earlier occasions, the nature of the constitutional violation by the State of Missouri has been outlined only most generally. In our most recent opinion, *Liddell v. Board of Education of City of St. Louis,* 677 F.2d 626 (8th Cir. 1982) (*Liddell V*), *cert. denied,* ____U.S.____, 103 S. Ct. 172 (1983), the panel, speaking through Judge Heaney stated:

> We held in *Adams* that the state had substantially contributed to the segregation of the public schools of the City of St. Louis. No appeal was taken from that decision by the state. That decision has been settled and will not be reopened.

677 F.2d at 629. The Court there referred to the 1981 decision, *Liddell v. Board of Education of City of St. Louis,* 667 F.2d 643 (8th Cir.) (*Liddell III), cert. denied,* 451 U.S. 902 (1981), where the panel, again speaking through Judge Heaney stated:

> The State of Missouri vigorously contends that it should have no part in paying for the costs of integration because its actions did not violate the Constitution. . . .
>
> This contention is wholly without merit. In our March 3 opinion, we specifically recognized the causal relationship between the actions of the State of Missouri and the segregation existing in the St. Louis school system. Furthermore, we expressly directed the district court to apportion the costs of the desegregation plan among the defendants. *Adams v. United States, supra,* 620 F.2d at 1295 n.28. These statements amount to a clear reversal of the district court's findings concerning the liability of the State, and the State has chosen not to seek review of that decision in the Supreme Court. At the very least, our opinion left the district court free to review its earlier conclusions. We will not disturb its decision to do so.

677 F.2d at 654.

These opinions referred to the earlier en banc decision in *Adams v. United States,* 620 F.2d 1277 (8th Cir.), *cert. denied,* 449 U.S. 826 (1980). In *Adams,* the Court held that the district court had erroneously concluded that the Board of Education had discharged its duty to desegregate the St. Louis school system by adopting a neighborhood school plan and refraining from discriminatory actions thereafter and that factors over which the Board of Education had no control were responsible

for today's segregation in the St. Louis school system. *Adams,* 620 F.2d at 1291. The Court observed that most schools in north St. Louis were black in 1954 and remained black and that most schools in south St. Louis were white in 1954 and remained white. The Board had not dealt with the problem in 1954 to 1956 by developing a plan that would integrate the schools in north and south St. Louis. The Court concluded: "We have no alternative but to require a system-wide remedy for what is clearly a system-wide violation." *Id. Liddell III & V* refer to the discussion on pages 1294 and 1295 in *Adams,* and footnotes 27 and 28. Testimony of Dr. Orfield that an interdistrict remedy funded by the State of Missouri would have the best chance of permanently integrating the schools in metropolitan St. Louis was discussed, together with the pre-*Brown* practices of both the St. Louis suburban school districts and those of the City of St. Louis to maintain segregated schools. The costs of the desegregation plan were to be apportioned among the defendants as determined by the district court.

It is evident that this discussion in *Adams* is dealing with the St. Louis City school system. The Board was directed to develop a system-wide plan for integrating the elementary and secondary schools. The court remanded "to the district court with instructions to take those steps necessary to bring about an integrated school system" in accordance with certain guidelines and timetables set out. *Adams,* 620 F.2d at 1295. Cooperative transfers with suburban districts in St. Louis County were discussed.

This discussion in *Adams* does not address the question of interdistrict violation or interdistrict remedy.

This conclusion is fortified by the suggestion in *Liddell V* that "the interdistrict liability proceedings previously severed from the remainder of the case be postponded until after . . . an order in the pending 12(c) proceeding" and that "the interdistrict liability aspect should then proceed promptly thereafter." 677

F.2d at 642. The district court and this Court have not to this time made findings or conclusions of interdistrict violation.

Liddell V made the following reference with respect to the State defendants:

> [T]hey are primary constitutional wrongdoers and, therefore, can be required to take those actions which will further the desegregation of the city schools even if the actions required will occur outside the boundaries of the city school district.

677 F.2d at 630.

The decision discussed the voluntary participation of suburban schools and the preparation and submission of feasibility plans for interdistrict desegregation involving city and suburban schools. 677 F.2d at 641.

Following *Liddell V,* the district court commenced its preparation for trial of the interdistrict issues, but before the trial could proceed and findings on the interdistrict violation and remedy issues could be made, the settlement now before the Court was achieved, with the State not participating. From this history the only conclusion that we can reach is that the constitutional violation found on the part of the State and the City of St. Louis is failure to take necessary actions to desegregate the schools in the City of St. Louis and particularly to desegregate the schools on a system-wide basis, including the predominantly white schools in south St. Louis and the predominantly black schools in north St. Louis.

II.

The scope of remedy available once a constitutional violation has been found has been discussed by the United States Supreme Court most recently in *Pasadena City Board of Education v. Spangler,* 427 U.S. 424, 49 L.Ed.2d 599 (1976), in which the Court speaking through Justice Rehnquist stated:

> [I]n Swann the Court cautioned that "it must be recognized that there are limits" beyond which a court may not go in seeking to dismantle a dual school system. *Id.*, at 28, 28 L.Ed.2d 554, 91 S Ct 1267. These limits are in part tied to the necessity of establishing that school authorities have in some manner caused unconstitutional segregation, for "[a]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis." *Ibid.*

427 U.S. at 434. The district court order in *Pasadena* was set aside, the Court finding that there was no showing that the post-1971 changes in the racial mix of the Pasadena schools was caused by segregative actions chargeable to the defendants, pointing to changes in the demographics of Pasadena's residential patterns. 427 U.S. 435-36.

The principles limiting available remedies were outlined in *Hills v. Gautreaux,* 425 U.S. 284, 47 L.Ed.2d 792 (1976). The Court there reviewed the earlier decision in *Milliken v. Bradley,* 418 U.S. 717 (1974) (*Milliken I*). It pointed to the fundamental limitation on the remedial powers of the federal courts to restructure the operation of local and state government, and explained that that power may be exercised only on the basis of constitutional violation. *Hills, supra,* 425 U.S. at 293, 47 L.Ed.2d at 801. The Court stated that

> [o]nce a constitutional violation is found, a federal court is required to tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." In Milliken, there was no finding of unconstitutional action on the part of the suburban school officials and no demonstration that the violations committed in the operation of the Detroit school system had had any significant segregative effects in the suburbs. (Citations omitted.)

425 U.S. at 293-94.

Hills discussed the conclusions in *Milliken I* in detail as we have demonstrated above. Further limits established by *Milliken I* are as follows:

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. Swann, 402 US, at 16, 28 L Ed 2d 554. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

418 U.S. at 744-45.

The Supreme Court more recently in *General Building Contractors Ass'n v. Pennsylvania*, ____ U.S. ____, ____, 102 S.Ct. 3141, 3154 (1982), has held that judicial remedial powers of the federal court can "be exercised only on the basis of a violation of the law and . . . [can] extend no farther than required by the nature and extent of . . . [the] violation."

From this discussion it is apparent that the issue before this Court is what measures are tailored to fit the scope and nature

of the State's constitutional violation. As we have seen, that constitutional violation is at most intradistrict in nature and, specifically, the failure to take measures to desegregate the St. Louis school system, particularly the north and south sides of that system. There is no hint of a finding that there was an interdistrict effect flowing from this intradistrict violation.

Under these principles the intradistrict violations found are insufficient to require the interdistrict remedy agreed to by all of the parties except the State of Missouri, and to impose the cost of this remedy on the State of Missouri. Because there are no findings by the district court as to the extent of the remedy required, this Court should not give its approval to a settlement placing substantial funding responsibility on the State of Missouri.

The Supreme Court in *Hills* concluded that selection of sites for public housing in the City of Chicago by HUD justified a remedy beyond the City of Chicago's territorial boundaries. The reasons for the conclusion were discussed as follows:

> Here the wrong committed by HUD confined the respondents to segregated public housing. The relevant geographic area for purposes of the respondents' housing options is the Chicago housing market, not the Chicago city limits. . . . An order against HUD and CHA regulating their conduct in the greater metropolitan area will do no more than take into account HUD's expert determination of the area relevant to the respondents' housing opportunities and will thus be wholly commensurate with the "nature and extent of the constitutional violation." (citation omitted.)

425 U.S. at 299-300.

Hills does not justify the conclusion reached by this Court. In *Hills* HUD had made an expert determination that the Chicago area and not simply the City of Chicago was the relevant area.

The wrongful act of HUD was confining the respondents to segregated public housing. We have no record in this case that the State of Missouri confined black students to the City of St. Louis as opposed to the county nor that the State had conceded the city and county to be the relevant area in issue. We have no finding that any of the intradistrict violations of the State which occurred within the City of St. Louis had any relationship to the county, or conversely that any acts of the State that may have been of an interdistrict nature affected the City. In *Hills* the particular facts pointed to the nature of the constitutional violation and a remedy in the larger area. *Hills* cannot support the interdistrict remedy approved by the Court today. The district court has made no findings in a vein similar to *Hills* and the Court in its opinion has reached no conclusions similar to those in *Hills* except the unsupported assertion that *Hills* justifies the remedy.

III.

The Court today bases its approval of the interdistrict transfers on the questionable ground that this issue has been previously decided. The Court's earlier decisions, in which we have discussed the nature of the constitutional violation, do not support its conclusion.

Liddell III, supra, 667 F.2d 643, dealt with the earlier order of the district court relating to a voluntary cooperative plan of pupil exchanges between the city and county (12(a)), a merger and full desegregation of the separate vocational educational programs in the county and city (12(b)), and development and submission of "a suggested plan of interdistrict school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County." 667 F.2d at 650-51. The Court, with respect to paragraph 12(a), specifically states, "[b]ecause the plan is to be voluntary, no question is raised about whether the district court will be able to enforce the plan once it is drawn up." 667 F.2d at 651. Paragraph 12(b), relating to vocational

education, was based upon a specific finding of the district court that a separate special district for vocational education was part of the State's failure to take affirmative steps to eradicate the dual system it had formally mandated, and was designed to remedy this violation.

Paragraph 12(c) in *Liddell III* relates to a suggested feasibility study and goes no farther. It recognized that to the extent that segregation was imposed by county school districts, not parties to the lawsuit and not designated as constitutional violators, it could not be considered as government-imposed. To the extent of any segregation imposed by the State or other defendants "and to the extent those defendants have the power to remedy the violation, it is proper for the district court to order them to take steps to do so." 667 F.2d at 651. The Court's opinion, however, cited no finding and made no conclusion that city-county interdistrict segregation was imposed by the State or the City Board. Later in the opinion, the Court specifically referred to the apportionment of costs in *Adams. Liddell III,* 667 F.2d at 654. In discussing apportionment of costs, the Court mentioned specifically the segregation existing "in the St. Louis school system." These statements but reinforce the Court's reliance on the intradistrict violation as the basis for its action. The Court today gives an overly broad reading of *Liddell III.*

In *Liddell V,* 677 F.2d 626, the Court recognized that *Adams* held that the State had contributed to the segregation "of the public schools of the City of St. Louis." Citing *Hills, supra,* it then concluded that paragraph 12(a) relating to voluntary inter-district transfers is entirely enforceable against the State defendant and that the State can be required to take actions that will further the desegregation of the city schools, even if the actions required will occur outside the boundaries of the city school district. As we have seen, the Court in *Liddell III & V* did not attempt to identify a type of constitutional violation similar to that in *Hills,* in which actions had confined a certain group of persons to one portion of the area in question, or to

demonstrate a finding, concession or conclusion that the city-county area should be considered as one. The Court was considering only "a modest beginning toward voluntary interdistrict desegregation." The Court concluded in *Liddell V* that the State and the city school board must take action to eradicate the remaining vestiges of government-imposed school segregation in the city schools. The Court's references to "actions which may involve the voluntary participation of the suburban schools; and, specifically, to "requir[ing] the state to provide additional incentives for voluntary interdistrict transfer," 677 F.2d at 641-42, were given by way of example only. The tentative suggestion that the State provide "additional incentives" is far from a conclusion that the State be required to fund a voluntary interdistrict transfer plan in which it was not a consenting party. These suggestions were made with reference to the 12(c) hearings which it suggested go forward, and which specifically related to development of a feasibility plan for overall integration. The interdistrict liability proceedings were to await this development. 677 F.2d at 642. The Court today has engaged in a massive bootstrapping effort to find that *Liddell III* or *Liddell V* has established the liability of the State for the interdistrict transfer plan.

The Court declares that we are bound by our previous holdings as to interdistrict transfers. The law of the case doctrine, however, applies with less force to prior decisions of a panel. *Van Gemmert v. Boeing Co.*, 590 F.2d 433, 436-37 n.9 (2d Cir. 1978); *aff'd*, 444 U.S. 472 (1980); 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §4478 at 796-97. Resting as it does on the precarious comparison with *Hills*, even if the issue were firmly established by *Liddell V*, the Court en banc should attempt to decide the case correctly rather than consistently. *See Robbins, et al v. Prosser's Moving & Storage Co.*, 700 F.2d 433, 438 (8th Cir. 1983); *United States v. Unger*, 700 F.2d 445, 450 n.10 (8th Cir. 1983); *Wrist-Rocket Manufacturing Co. v. Saunders Archery Co.*, 578 F.2d 727, 730 (8th Cir. 1978).

IV.

The State was ordered to match funds raised in a bond issue submitted to the voters by the City Board for capital improvements. The issue failed and this Court's order rather hastily approves the summary treatment of the district court with respect to this issue.

The laws of Missouri place the responsibility for maintenance of the schools' physical plant on the City Board of Education. Mo. Rev. Stat. § 177.031 (1984). This Court in its opinion correctly describes the age, deterioration and deferred maintenance of the plant. In twenty-four years thirteen bond issues have been defeated and one in 1962 approved only after resubmission. The last two bond issues were approved by a simple majority but the constitutional requirement of two-thirds voter approval has blocked passage of these issues.

There is no finding in the district court order and no conclusion by this Court that the condition of the physical plant of the St. Louis schools is related in any way to the constitutional violations of either the City Board or the State. There is nothing to suggest that the condition is other than purely and simply the result of the neglect of the City Board to fulfill its responsibilities. To order the State to pay half of this expense is to require a remedy beyond the constitutional wrong that has been found, which violates the principles laid down in *Milliken I*, *Hills* and *Swann*. This portion of the order violates the admonition of the Second Circuit in *Arthur v. Nyquist*, 712 F.2d 809, 813 (2d Cir. 1983), that "a court must be alert not to permit . . . use [of] a court's broad power to remedy constitutional violations as a means of upgrading an educational system in ways only remotely related to desegregation."

There are simply no district court findings and no conclusions by this Court to justify the State's participation in funding capital improvements. This is the sole responsibility of the City Board. Certainly in the absence of any findings by the district court that the segregative policies of the State had an impact on

the city schools' physical plant, that funding of additional capital improvements is necessary to redress such wrong, and that less ambitious efforts would not have been adequate, there is simply no basis to mandate this aspect of state funding.

V.

The Court today remands a portion of the funding order to the district court for further findings insofar as the district court issued specific mandates to the City Board with respect to its levy and the tax rollback. The Court, however, authorizes future specific action if the district court makes a finding that no other alternatives are available or sufficient to finance its desegregation order.

The Court need not and should not go this far. The taxing power of the states is primarily vested in their legislatures, deriving their authority from the people. *Green v. Frazier,* 253 U.S. 233, 239, 40 S. Ct. 499, 64 L.Ed. 878 (1920). In *Griffin v. County School Board of Prince Edward County,* 377 U.S. 218, 84 S. Ct. 1226, 12 L.Ed.2d 256 (1964), the Supreme Court ordered local authorities to operate a public school system like that operated in other counties in Virginia and to restore a tax illegally abolished, but specifically left the manner of levy and the amount and the means of collection to procedures under state law and standards. *See also Plaquemines Parish School Board v. United States,* 415 F.2d 817 (5th Cir. 1969). Our earlier decision in *United States v. Missouri,* 515 F.2d 1365 (8th Cir. 1975), *cert. denied sub. nom. Ferguson Reorganized School District v. United States,* 423 U.S. 951, 96 S.Ct. 374, 46 L.Ed.2d 288 (1975), simply permitted the tax levy to be established at the highest rate approved by voters in the largest district.

I have no quarrel with the proposition that, with proper findings that particular programs are necessary to remedy a constitutional violation that has been found to exist, a district court has the power to order the funding of those programs. The

order should simply be in the form, however, to mandate that certain programs be carried out, and legislative bodies should be left with the responsibility for structuring the local or state taxing instrumentalities to achieve the result required. The federal courts go too far in mandating specific taxing procedures. I thus agree with the Court today only insofar as it mentions the option of the district court to simply enter a judgment against the State, as tortfeasor, for the amount required to fund those programs necessary to remedy the constitutional violation.

VI.

The disagreement expressed with respect to the Court's opinion today is specifically limited to those areas set forth above. The programs required by the settlement plan within the city school district, and particularly within the all-black schools, to provide a quality education for those students deprived of proper educational opportunities by the segregative actions of defendants, and the enhancement and enrichment programs are fully justified by this Court's earlier findings of intradistrict violation. The magnet schools and integrative programs within the City of St. Louis are similarly geared to the particular violations that were found to have occurred. Thus, the opinion of the Court in III, IV (A) and (B) approved programs that are justified by the record before the district court, and this Court, and I join the Court in these portions of its opinion. The ruling on other issues in VII (A), (B) and (C) are properly reached.

The settlement plan is an inspired and far reaching one. I express my disagreement today only insofar as the State is required to fund a portion of this program that has been the subject of agreement by other parties and not the State, where there are no findings that those portions of the program are necessary to remedy the intradistrict constitutional violation that has been found. Even if the Court were to hold today in accordance with my views I believe that a settlement would nevertheless be achieved. The county school districts profit immeasurably by

the settlement agreement, as nearly all of the funding obligation is placed upon the State and they are relieved of the risk of being found to have in any way contributed to any interdistrict segregation. The State has further incentive to reach settlement as to these issues, and properly should be allowed to have a voice in the extent of the programs to be funded, because such a great portion of the expenses must be borne by the State.

BOWMAN, Circuit Judge, dissenting.

I join in Judge John R. Gibson's well-reasoned dissent concerning the lack of findings to support the interdistrict aspects of the remedy, the lack of findings to support the requirement that the State provide funding for capital improvements in the physical plant of the City schools, and the singular inappropriateness in our Constitutional system of a federal court's ordering state and local taxing authorities to impose specific tax increases. His opinion adequately reflects my disagreement with the decision of the Court in all three of those areas. I cannot agree, however, that the remaining intradistrict aspects of the remedy approved by the Court are justified by adequate findings, and for that reason I dissent separately.

The issue in this case is not whether quality education is a good thing, or whether it would be wise public policy for the State to dedicate more of its resources to the public schools. Instead, the issue is whether, on the present record, we have the Constitutional authority to compel the State to provide funding for the array of costly programs required by the settlement plan. I submit that we do not.

The costs of carrying out the plan that the Court today approves will be enormous. For the 1984-85 year alone, the State's share of these costs is likely to exceed $49,000,000, with the City school board contributing additional funds of approximately $15,000,000. These costs, and particularly the State's share, will increase very substantially in future years as the pace of implementation quickens. If these costs are necessary to remedy a Constitutional violation, then they must be borne by the respon-

sible parties—and ultimately by the citizens of the State—no matter how financially painful compliance may be. But if these costs go beyond what is needed to right a Constitutional wrong, if in fact the plan includes programs and amenities that may be laudable from an educational standpoint but are not tailored to the incremental segregative effects that have been caused by the Constitutional violation, then the effect of the Court's decision is to transfer, without any basis in law or the Constitution, funds from taxpayers or other competing programs (including other needy school districts) to the beneficiaries of this plan. Our problem as a reviewing court is that the record gives us no basis for an intelligent and principled determination of the critical question in this case: on which side of the line—Constitutional necessity or judicial excursion into policy-making and educational experimentation—do the various components of the plan approved by the district court fall?[1]

---

[1] A few examples will serve to illustrate the problem. The plan approved by the Court includes millions of dollars for such things as preschool centers, all-day kindergartens, schools of emphasis (which are in addition to the magnet schools), parental involvement, and Saturday classes. The magnet school component, as presently structured, will require over $22,000,000 during the plan's first two years. During 1984-85 alone, the plan would provide $1,762,000 for an item designated "Coordination of Instruction"—whatever that may entail. It was not even mentioned, much less discussed or made the subject of fact-finding, during the hearing conducted by the district court, and the same is true of virtually all the plan's specific items. Substantial funding is provided for "Curriculum Development," "Peer Tutoring," "Shared Motivation," "Role model experiences," and "Strengthen the capabilities of the public affairs unit." The capital improvements section of the plan purports to "ensure a learning environment which complements and supports the instructional program in a manner which optimizes the learning process." While the professional educators who drafted the plan may be forgiven for writing that way, we should not be forgiven if we allow this plan to go into effect without first insisting that it be examined in the manner the Constitution requires. Because of the lack of appropriate inquiry and fact-finding below, there is now no jurisprudentially acceptable way for us to determine whether any of these items are needed to remedy the Constitutional violation.

We do not have before us a desegregation plan fashioned by the district court after careful findings of fact of the kind required by the Supreme Court in *Dayton Bd. of Educ. v. Brinkman,* 433 U.S. 406, 417, 420 (1977). Rather, what we have before us is a desegregation plan fashioned by agreement of the City school board, the suburban school boards, and the plaintiffs. The State, which must bear the brunt of the costs, is not a party to the agreement. Over the objections of the State, the district court has adopted the agreement or plan, and it has done so without inquiring into the continuing effects of the Constitutional violation and the need for the various programs included in this plan to remedy those continuing effects.

In considering the proposed plan, the district court merely conducted a hearing to determine whether the proposed settlement plan "is fair, reasonable, and adequate for the resolution of *the 12(c) interdistrict phase* of this school desegregation case." *Liddell v. Bd. of Educ.,* 567 F. Supp. 1037, 1039 (E.D. Mo. 1983) (emphasis added). Thus the district court's inquiry was nothing more than the inquiry required under Rule 23(e), Fed R. Civ. P., to determine whether a settlement of a class action should be approved. Moreover, the inquiry was focused on the *interdistrict* phase of the case, not the *intradistrict* phase. Finding the plan satisfactory in terms of the Rule 23 considerations set forth in *Grunin v. Int'l House of Pancakes,* 513 F.2d 114, 123 (8th Cir.), *cert. denied,* 423 U.S. 864 (1975), and in Professor Moore's discussion of Rule 23, 3B Moore's Federal Practice ¶ 23.80[4] at 23-521 through 23-524, and giving a few obligatory bows to the Constitution in language wholly conclusory, the district court approved the plan and ordered all signatories, as well as the State defendants, to comply with all its provisions. 567 F. Supp. at 1042, 1055.

The district court's approach and its findings are totally inadequate to provide a Constitutional basis for its sweeping order and the only slightly less sweeping order that this Court today approves. The Constitutional violation that has been

found against the City school board and the State[2] would justify requiring them to create a unitary school system within the City school district, but it does not justify the judicially-compelled creation of a system that never would have existed even if *de jure* segregation never had been practiced in the City schools. As the Supreme Court has made clear, the remedy in a school desegregation case should restore the students in the affected school district " 'to the position they would have occupied in the absence of such conduct.' " *Milliken v. Bradley,* 433 U.S. 267, 280 (1977) (citation omitted) (*Milliken II*). Similarly, in *Dayton, supra,* the Supreme Court has made our duty—and the limits of our authority—plain. In that case the Court was dealing, as we are dealing here, with a situation where *de jure* segregation of the races in the schools ceased many years ago. If, said the Court, Constitutional violations are found, then

> [T]he District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayon school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy.
>
> We realize that this is a difficult task, and that it is much easier for a reviewing court to fault ambiguous phrases such as 'cumulative violation' than it is for the finder of fact to make the complex factual determinations in the

---

[2] As Part I. of Judge John R. Gibson's separate opinion demonstrates, the exact nature of the Constitutional violation previously found in this case is not easily determined. I agree, however, with his conclusion that the violation found on the part of the City school board and the State is failure to take adequate steps to desegregate the schools throughout the City.

> first instance. Nonetheless, that is what the Constitution and our cases call for, and that is what must be done in this case.

Dayton, 433 U.S. at 420 (citation omitted).

In the case now before us, there has been no attempt to determine the incremental segregative effects of the Constitutional violation committed by the defendants or to compare the present City school population to what it would have been absent a violation. There has been no tailoring of the order to redress only "that difference" referred to in *Dayton* or to restore students in the City schools "to the position they would have occupied in the absence of such conduct" as required by *Milliken II.*

The district court's failure to conduct a *Dayton*-type inquiry and to make findings on incremental segregative effects has rendered it impossible for this Court properly to review the district court's order. This failure has left us without any measuring stick by which we can assess the various components of the settlement plan. The opinion of the Court implicitly recognizes this difficulty when, in searching for some standard to guide its review of certain of the compensatory and remedial programs approved by the district court, the Court resorts to a school classification device—Class AAA status—developed by the State's Department of Education as a means of rating schools, and approves programs necessary to permit the City schools to regain and retain their Class AAA status. Although the Court's need to find a standard to which it can repair is understandable, I do not believe that the approach taken is sound. There has been no showing of any kind that in the absence of the defendants' Constitutional violation the City schools would have maintained Class AAA status. Thousands of Missouri school children, over one-quarter of the total number, attend schools that lack Class AAA status. That fact alone, when coupled with the recent restoration of the City schools to Class AAA status, casts considerable doubt on the

proposition that any educational problems that may exist within the City schools are of unusual severity or that they rise to a level of Constitutional concern. In any event, we cannot simply make assumptions about the continuing harms that have flowed from the violation; rather, these harms must be determined by the kind of fact-finding by the district court and review by this Court that *Dayton* mandates.

The process by which the settlement plan came into being underscores the need for careful fact-finding before imposing the plan and its burdensome costs upon the State. In the first place, it would be a most remarkable coincidence if a plan intended to settle the broad interdistrict claims in this case was at the same time properly tailored to cure only the effects of the intradistrict violation. Moreover, it must be remembered that the negotations leading to the plan largely excluded the State, at least during the critical latter stages when it had become apparent to the State that it could not agree to a plan of the scope and cost that the other parties were determined to achieve. The plan was expressly conditioned upon compulsory funding from the State, and all the participating school districts stood to reap substantial benefits. None of them had any real incentive to prevent the others from piling their plates high with programs and funds that would benefit their school systems. As might be expected, there is no indication that the parties to the negotiations made any attempt to measure the incremental segregative effects of the violation on which the plan rests or to remedy only those effects. Such negotiations are inherently unlikely to produce a remedy narrowly tailored to the Constitutional wrong and any present-day educational deficiencies resulting therefrom that fairly may be charged to the State and, through it, to citizens in all walks of life throughout the State. Thus the need for judicial alertness, and careful fact-finding, is especially critical in this case.[3]

---

[3] The looseness, vagueness, and uncertainties of the plan were emphasized by one of the witnesses at the hearing before the district court:

For the reasons stated above, I would reverse the judgment of the district court and remand the case to the district court for further proceedings consistent with this opinion. I would hope, of course, that the parties could resume their negotiations and achieve a settlement agreement to which all could assent.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

> In nearly every program budget [of the plan], one can point to some strange budget items, some budget items which are not consistent with the description, certainly not with the planning as is in the case of many programs and I would not approve it under any circumstances until all those points were clarified, until it was clear what was expected to happen as a result of the expenditure of money, and only then if one could conclude it would not interfere so extensively with the programs in the City that they would be rendered in poorer shape than they are.

Testimony of Otis Baker, Coordinator of State and Federal Programs, Division of Instruction, State Department of Elementary and Secondary Education. Tr. of Fairness Hearing, p. 169. Another witness, an out-of-state "expert" presented by the proponents of the plan, acknowledged during cross-examination that to her knowledge there is not another urban school system in the United States that has all the components that are included within the quality education improvements contained in the settlement plan. Testimony of Carol Gibson, Director of Education, National Urban League. Tr. of Fairness Hearing, p. 1-195. One of the opponents' witnesses made the following observation concerning the quality education improvements portion of the plan:

> This whole section of the proposal looks to be an attempt by the Saint Louis school board to justify every expense they now have and every kind of expenses they can dream up for the future, as a part of the desegregation case. We well remember their earlier attempt to have general maintenance and painting needs become a part of the start-up expenses for implementing the 12(a) plan now in effect.

Testimony of Shannon K. Burnside, President, West County Association for Neighborhood Schools. Tr. of Fairness Hearing, p. 3-49, 50.